TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. ~~902~~ ~~702~~ 130

POSTAL TELEGRAPH-CABLE COMPANY, PLAINITIFF IN ERROR,

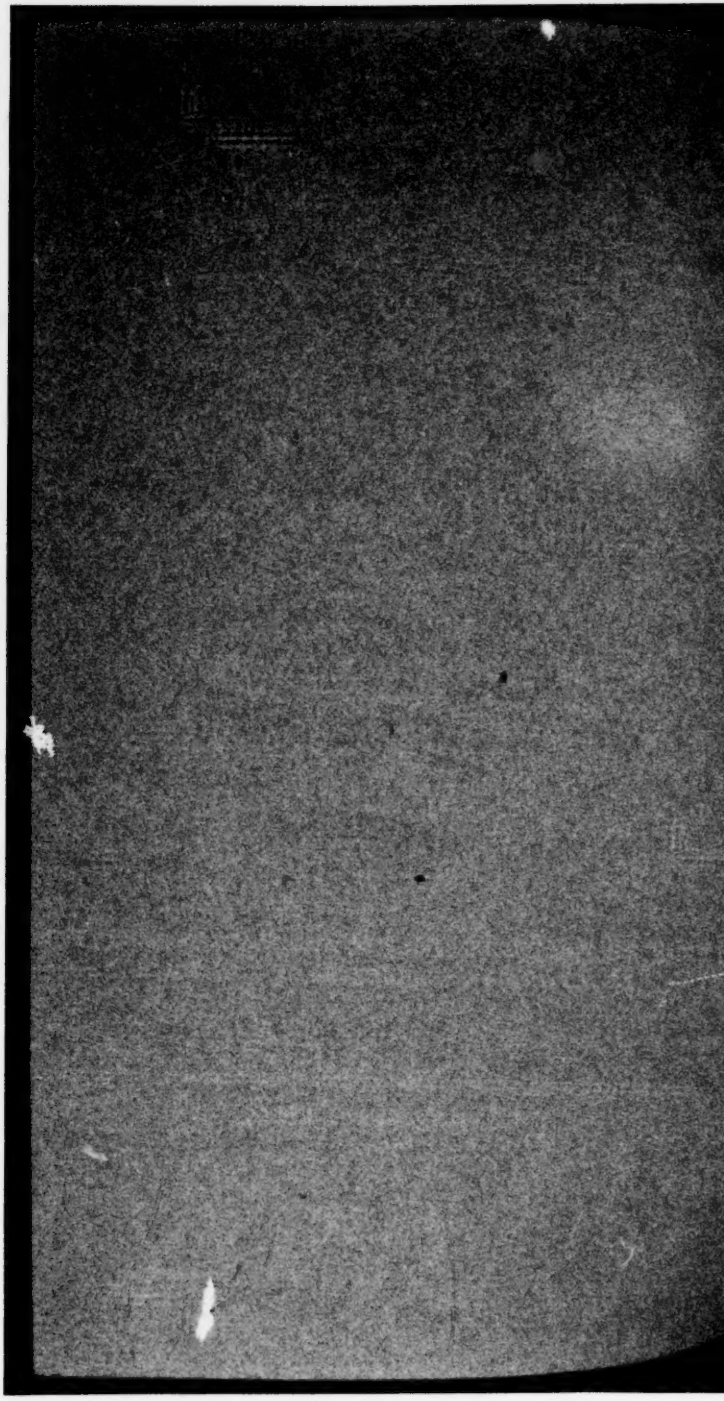
vs.

TONOPAH AND TIDEWATER RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT OF THE STATE OF NEW YORK.

FILED FEBRUARY 8, 1917.

(25,761)



(25,761)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 931.

POSTAL TELEGRAPH-CABLE COMPANY, PLAINTIFF IN ERROR,

vs.

TONOPAH AND TIDEWATER RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, OF THE STATE OF NEW YORK.

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New York Supreme Court

Appellate Division — First Department.

POSTAL TELEGRAPH-CABLE COMPANY,

Plaintiff-appellant,

against

TONOPAH AND TIDEWATER RAILROAD COMPANY,

Defendant-respondent.

Statement Under Rule 41 on Appeal to Appellate Division.

This action was commenced in the Municipal Court of the City of New York, Borough of Manhattan, First Department, by the service of a summons and complaint on the defendant on June 7th, 1916. Notice of appearance on behalf of the defendant was served on June 12th, 1916. Answer was served and issue joined on June 13th, 1916. The names of the parties appear in full above and there has been no change in the parties or attorneys since the commencement of the suit.

The Appellate Term affirmed the judgment of the Municipal Court and in the order of affirmance granted leave to the appellant to appeal to the Appellate Division.

Notice of Appeal to Appellate Division.

NEW YORK SUPREME COURT.

APPELLATE TERM—FIRST JUDICIAL DEPARTMENT.

POSTAL TELEGRAPH-CABLE COMPANY,
Plaintiff-appellant,
against
TONOPAH AND TIDEWATER RAILROAD COMPANY,
Defendant-respondent.

TAKE NOTICE that the above-named plaintiff hereby appeals to the Appellate Division of the Supreme Court for the First Department, pursuant to the permission granted by the Appellate Term, from the judgment of affirmance entered herein in the office of the Clerk of the Municipal Court of the City of New York, Borough of Manhattan, First District, on the 2d day of November, 1916, and from the order of affirmance of the Appellate Term of said Supreme Court entered herein in the office of the Clerk of the County of New York, on the 2nd day of November, 1916, and the said plaintiff appeals from each and every part of said judgment and order as well as from the whole thereof.

Dated, November 8th, 1916.

Yours, etc.,
WILLIAM W. COOK,
Attorney for Plaintiff-Appellant,
44 Wall Street, New York City.

To

The Clerk of the County of New York, and

The Clerk of the Municipal Court of the City of New York, Borough of Manhattan, First District, and

Steele, DeFriese & Steele, Esqs.,
Attorneys for defendant-respondent.

NEW YORK SUPREME COURT.

APPELLATE TERM—FIRST DEPARTMENT.

POSTAL TELEGRAPH-CABLE COMPANY,

Plaintiff-appellant,

against

TONOPAH AND TIDEWATER RAILROAD COMPANY,

Defendant-respondent.

Statement under Rule 41 on Appeal to Appellate Term.

This appeal is taken from a judgment of the Municipal Court of the City of New York, Borough of Manhattan, First District. The judgment appealed from was entered in the office of the Clerk of the said Court on June 30th, 1916. The action was commenced on the 7th day of June, 1916, by the service of a summons and verified complaint. Notice of appearance on behalf of the defendant was served on June 12th, 1916. On June 13th verified answer was served. The names of the original parties in full are as follows: Postal Telegraph-Cable Company, plaintiff; Tonopah and Tidewater Railroad Company, defendant. There have been no changes in the parties since the commencement of the suit. The names of the attorneys appearing for the respective parties in the appeal are, for the appellant, William W. Cook, 44 Wall Street, New York City, New York. For the respondent, Steele, deFriese & Steele, 32 Nassau Street. Notice of appeal was served on July 1st, 1916.

Notice of Appeal to Appellate Term.

MUNICIPAL COURT OF THE CITY OF NEW YORK.
BOROUGH OF MANHATTAN—FIRST DISTRICT.

POSTAL TELEGRAPH-CABLE COMPANY,
Plaintiff-appellant,
against
TONOPAH AND TIDEWATER RAILROAD COMPANY,
Defendant-respondent.

File No. 14033—16

TAKE NOTICE that the above-named plaintiff hereby appeals to the Supreme Court of the State of New York, Appellate Term, First Department, from the judgment of the Municipal Court of the City of New York, Borough of Manhattan, First District, entered herein in the office of the Clerk of said Court at 146 Grand Street, Borough of Manhattan, New York City, New York, on or about the 30th day of June, 1916, whereby judgment for the defendant was rendered herein, and the said plaintiff appeals from each and every part of said judgment as well as from the whole thereof.

Dated, July 1st, 1916.

Yours, etc.,

WILLIAM W. COOK,
Attorney for Plaintiff-Appellant,
44 Wall Street, New York City.

To

Clerk of the Municipal Court of the City of New York, Borough of Manhattan, First District, and

Messrs. Steele, deFriese & Steele,
Attorneys for Defendant-Respondent.

Summons.

MUNICIPAL COURT OF THE CITY OF NEW YORK.
BOROUGH OF MANHATTAN—FIRST DISTRICT.

POSTAL TELEGRAPH-CABLE COMPANY, *Plaintiff,* *against* TONOPAH AND TIDEWATER RAILROAD COMPANY, *Defendant.*	SUMMONS.

TO THE ABOVE-NAMED DEFENDANT:

You are hereby summoned to appear in this action in the Municipal Court of the City of New York, Borough of Manhattan, First District, before the Clerk of the said Court at his office at 146 Grand Street, in the Borough of Manhattan, in the City of New York, within five days after the service of this summons upon you, exclusive of the day of service, and to make answer to the complaint; and if you fail to make answer, judgment will be taken against you for the sum of $7.32.

Dated, New York City, the 7th day of June, 1916.

WILLIAM W. COOK,
Attorney for Plaintiff,
(Office and Post Office Address)
44 Wall Street,
New York City.

Plaintiff's address, 253 Broadway, New York City.

Complaint.

MUNICIPAL COURT OF THE CITY OF NEW YORK.
BOROUGH OF MANHATTAN—FIRST DISTRICT.

POSTAL TELEGRAPH-CABLE COMPANY,

Plaintiff,

against

TONOPAH AND TIDEWATER RAILROAD COMPANY,

Defendant.

The above-named plaintiff for a complaint against the above-named defendant alleges as follows:

I. That during all the times hereinafter mentioned the plaintiff was and still is a corporation duly organized under and in accordance with the laws of the State of New York for the purpose of transacting the business of transmitting and delivering telegraphic messages in the city and State of New York, and into and through other states of the United States.

II. That during the time hereinafter mentioned the defendant was and still is a corporation duly organized under and in accordance with the laws of the State of New Jersey for the purpose of owning and operating railroads and carrying on the railroad business in said state and in other states of the United States.

III. That during the month of April, 1916, the plaintiff transmitted for the defendant, at the request of the defendant, divers and sundry interstate messages to New York City and elsewhere. That during the said month of April, 1916, plaintiff, at the request of defendant, rendered services for the defendant in transmitting interstate

telegraph messages to New York City and elsewhere.

IV. That the said services and delivery and transmission of said messages are reasonably worth the sum of Seven and 32-100 dollars ($7.32).

V. That no part of the said sum of Seven and 32-100 dollars ($7.32) has been paid.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of Seven and 32-100 dollars ($7.32).

WILLIAM W. COOK,
Attorney for Plaintiff,
44 Wall Street, New York City, N. Y.

STATE OF NEW YORK,
County of New York. } ss.:

EDWARD C. PLATT, being duly sworn, deposes and says that he is the Treasurer of the Postal Telegraph-Cable Company, the plaintiff above named, which company is a corporation created under the laws of the State of New York, and that the foregoing complaint is true to the knowledge of the deponent, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. Deponent further says that the reason why this verification is not made by the plaintiff is that the plaintiff is such corporation; that this deponent is an officer of the same, to wit, its Treasurer, and is acquainted with the facts.

EDWARD C. PLATT.

Sworn to before me this
7th day of June, 1916.

ROBERT J. HALL,
Notary Public,
Kings County, No. 65.
Certificate filed in N. Y. Co., No. 136.

Answer.

MUNICIPAL COURT OF THE CITY OF NEW YORK.
BOROUGH OF MANHATTAN—FIRST DISTRICT.

POSTAL TELEGRAPH-CABLE COMPANY,
Plaintiff,
vs.
'ONOPAH AND TIDEWATER RAILROAD ROAD COMPANY,
Defendant.

The defendant above named, by Steele, deFriese & Steele, its attorneys, answering the complaint of the plaintiff herein, alleges as follows:

1. The defendant admits each and all of the allegations set forth in paragraphs 1, 2, 3, 4 and 5, of the complaint herein.

FOR A DEFENSE TO THE ALLEGED CAUSE OF ACTION IN SAID COMPLAINT SET FORTH, DEFENDANT ALLEGES AS FOLLOWS:

2. On or about the 26th day of June, 1907, the plaintiff herein and the defendant herein entered into a contract in writing, a true copy of which is hereunto annexed, marked "Exhibit A" for identification, and made in all things a part hereof; wherein and whereby it was covenanted and agreed among other things as appears in paragraphs "Ninth", "Tenth" and "Eleventh" of said contract that the plaintiff should transmit telegrams and messages relative to the business of the defendant at the defendant's request, without compensation, over the lines of the plaintiff company within the United States, to an amount calculated at the regular day rates of the plaintiff

company not exceeding $12.00 per annum for each and every mile of railroad up to two hundred miles on which telegraph wires are operated under said agreement and not exceeding $10 per annum for each and every mile of railroad over two hundred miles on which telegraph wires are operated under the said agreement. In consideration of said free service to be rendered by the plaintiff to the defendant, the defendant should furnish free transportation to officers, employees, laborers, etc., of the plaintiff company when travelling on the business in connection with the construction, maintenance or operation of the plaintiff's lines; such transportation to be furnished without compensation to defendant further than the benefits to the defendant of said contract, but not to exceed in any year the amount of telegraph service that the plaintiff agrees to perform for said defendant.

3. The services rendered for which the plaintiff herein is now suing consist of the transmission of telegrams relative to the business of the defendant herein, and the same were not in excess of the amount of services to be rendered without compensation to the plaintiff, as per contract heretofore referred to.

4. The defendant has duly performed each and all of the conditions on its part to be performed as required by contract heretofore referred to.

WHEREFORE, the defendant demands that the complaint herein be dismissed with the costs and disbursements of this action.

STEELE, DEFRIESE & STEELE,
Attorneys for defendant,
Office and P. O. Address,
32 Liberty Street,
New York, N. Y.

Answer.

STATE OF NEW YORK,
County of New York. } ss.:

CHRISTIAN B. ZABRISKIE, being duly sworn, deposes and says that he is Secretary and Treasurer of the Tonopah and Tidewater Railroad Company, the defendant herein, which company is a corporation created under the laws of the State of New Jersey, and that the foregoing answer is true to the knowledge of the deponent except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true. Deponent further says that the reason why this verification is not made by the defendant is that the defendant is such corporation; that this deponent is an officer of the same, to wit, the Secretary and Treasurer, and is acquainted with the facts.

CHRISTIAN B. ZABRISKIE.

Sworn to before me this
13th day of June, 1916.

Frank Walher,
Notary Public, Kings Co.
Reg. No. 8009.
New York Co. Reg. No. 8145.
Commission expires March 30, 1918.

Exhibit A attached to Answer.

THIS AGREEMENT, made and entered into this 26th day of June, 1907, by and between the Postal Telegraph-Cable Company, a corporation duly organized and existing under the laws of the State of New York, and the Tonopah and Tidewater Railroad Company, a corporation duly organized and existing under the laws of the State of New Jersey, hereinafter for convenience re-

ferred to as the Telegraph Company and the Railroad Company, respectively,

WITNESSETH;

WHEREAS, the Telegraph Company and its allied companies operate a system of telegraph throughout the United States; and

WHEREAS, the Railroad Company is constructing or about to construct a line of railroad with a telegraph line thereon between Ludlow, San Bernardino County, California, and Beatty and Rhyolite, Nye County, Nevada; (a distance of not over 200 miles) via Crucero, California; Dumont and Zabriskie, California, with branches approximating 45 miles; (the route of said line of railroad being shown on the diagram hereto attached and made a part hereof) and desires to operate the said telegraph line and future additions to and extensions thereof in connection with the system of the Telegraph Company for the purpose of an interchange of commercial telegraph business.

NOW THEREFORE, in consideration of the covenants and agreements hereinafter specified to be performed and observed by each of them and for other valuable considerations moving from each of said parties to the other, receipt of which is hereby acknowledged by each of the parties hereto, the parties hereto agree with each other as follows:

FIRST: (1) It is mutually agreed that commercial telegraph business between points on the lines of said Railroad Company and points on the lines and connections of the Telegraph Company shall be interchanged exclusively between the parties hereto except that telegraphic business of the Telegraph Company to points where both

companies have offices is not included in this contract. Each of the parties hereto agrees that it will turn over to the other at Ludlow, California, or at such other connecting points as shall best secure prompt transmission to destination, all commercial telegraph business which it may be able to obtain or control directed to points on the lines or connections of the other party (including all cablegrams and all commercial telegraph business which shall come to it from any other telegraph company).

(2): Additional points of connection may be established by mutual consent from time to time as the business of the parties hereto may require.

SECOND: (1) All tolls and revenue on messages handled exclusively by and between the officers of the Railroad Company along its line of railroad shall belong to the Railroad Company.

(2): After deducting from the total tolls on all interchanged telegraph messages originating at or directed to points on the lines of the Railroad Company the total amounts which the Telegraph Company may pay or account for to other connecting lines, the balance of said total tolls shall be divided between the parties hereto, seventy-five (75) per cent. to the Telegraph Company and twenty-five (25) per cent. to the Railroad Company.

(3): The Telegraph Company shall determine all questions of tariff and shall fix all rates for commercial telegraph business to and from the offices on the lines of the Railroad Company, and the tariff rates of the Telegraph Company, now or hereafter in force, shall apply to said business; and said business shall be accounted for and handled at said offices in accordance with the rules, regulations, instructions and tariff rates as

published from time to time in the tariff books, circulars and notices of the Telegraph Company.

(4): Each party hereto agrees to make to the other party hereto, in the form and manner required by the Auditor of the Telegraph Company, a monthly statement, showing all commercial telegraph business interchanged under this agreement between their respective offices and the balance due and payable thereon. Said statement shall be rendered not later than the 20th day of the month following, and each party hereto agrees to pay, within sixty (60) days after receipt of such statement, any balances shown therein that are properly due and payable.

THIRD: (1) Each party hereto hereby summons all liability for damages resulting from mistakes or delays, or for non-delivery or other defaults in the transmission of commercial telegraph business under this agreement that may occur at its own offices or upon its own lines or that may be occasioned by the fault of its own employees, and in case such default cannot be located it is mutually agreed that any damages or liabilities resulting therefrom shall be divided and borne by the parties hereto in the same proportion as the tolls were divided upon the message from defaults in the transmission of which such damages or liabilities may have arisen.

(2): Neither party hereto shall be liable to the other for loss or damage resulting from interruption to lines, which could not with reasonable care and promptness have been avoided or repaired.

FOURTH: (1) The Telegraph Company hereby agrees to advertise the offices of the Railroad Company as a part of its general system and to furnish, and deliver at the most convenient terminus of the Railroad Company, office signs,

message blanks and other forms necessary for the proper conduct of the commercial telegraph business at said offices, and the Railroad Company hereby agrees that such signs, blanks and forms shall be used at all of its offices, the purpose being to identify the commercial telegraph business done at said offices with the Telegraph Company's system.

(2): The Telegraph Company agrees to furnish to the Railroad Company without charge to the Railroad Company a sufficient number of eight foot cross arms (with pins, insulators, braces and bolts necessary therefor) to equip the Railroad Company's poles (one crossarm to each pole) between Ludlow and Beatty, a distance of not to exceed two hundred (200) miles, it being further understood that the existing or standing poles of the Railroad Company shall be used. Said poles and cross-arms shall be erected at the Railroad Company's own cost and expense and shall be the property of the Railroad Company, subject, however, to the rights of the Telegraph Company as hereinafter provided.

FIFTH: The Telegraph Company agrees to give to the Railroad Company the use of the Telegraph Company's main batteries now or hereafter established at connecting points for the operation of the Railroad Company's wires on which commercial telegraph business is handled under this agreement, without charge to the Railroad Company therefor; it being distinctly understood and agreed however, that the Telegraph Company shall not be required to provide or maintain any main batteries at any point solely for the use of the Railroad Company.

SIXTH: (1) The Railroad Company hereby agrees to maintain its railroad telegraph lines herein mentioned in good working order and re-

pair, at its own cost and expense, and to repair with the utmost diligence any interruptions to said lines.

(2): The Railroad Company agrees that each of its stations where a telegraph office shall be maintained, the Railroad Company shall keep in its employ a sufficient number of competent operators and messengers to handle the commercial telegraph business to and from said station, in the most careful, efficient and expeditious manner. Said operators and messengers shall be paid by the Railroad Company, but shall be satisfactory to the Telegraph Company so far as the handling of commercial telegraph business is concerned, and any of said employees who may not be satisfactory to the Telegraph Company in that respect shall be removed from service so far as the handling of commercial telegraph business is concerned upon written request so to do from the general superintendent of the Telegraph Company.

SEVENTH: (1) The Railroad Company agrees to furnish in its office at Ludlow, California, the operators necessary for the proper transmission and receipt upon the wires of the Telegraph Company of the interchanged commercial telegraph messages herein provided for. It is mutually agreed that the wires of the Railroad Company may be connected at Ludlow to such wires of the Telegraph Company as the latter company may designate so as to form a direct circuit or circuits between offices on the lines of the Railroad Company and offices on the lines of the Telegraph Company at such times and in such manner as may be mutually agreed upon, it being understood and agreed that all business handled on said direct circuits between railroad offices and the offices of the Telegraph Company shall

be considered as having been interchanged under this agreement at Ludlow.

(2): The Telegraph Company agrees to furnish at its main offices at additional points of connection hereafter established by mutual consent from time to time as hereinabove provided, the operators necessary in said main offices for the proper transmission to and receipt from the Railroad Company's wires between said main offices and the offices of the Railroad Company of the interchanged commercial telegraph messages herein provided for, and it is mutually agreed that at said additional points of connection the wires of the Railroad Company may be connected to such wires of the Telegraph Company as the latter company may designate so as to form a direct circuit or circuits between offices of the Railroad Company and offices of the Telegraph Company, at such times and in such manner as may be mutually agreed upon, it being understood and agreed that all business handled on said direct circuits between offices of the Railroad Company and officers of the Telegraph Company shall be considered as having been interchanged under this agreement at the points where said wires are physically connected.

EIGHTH: (1) It is understood and agreed that the Telegraph Company may if it so elect establish and maintain at its own cost and expense, independently of the Railroad Company, and operate by means of the Telegraph Company's own wires strung upon the Railroad Company's poles as hereinafter provided, offices apart from the railroad stations in any of the cities and town upon the lines of said railway and extensions thereof (with such changes in location as may be deemed best from time to time) when the paid commercial messages to and from any of the said cities or town amount to twelve hundred (1200)

messages per month for three (3) consecutive months, and the Railroad Company shall not be entitled to any part of the tolls upon messages handled at said independent offices of the Telegraph Company, except (on messages actually handled at one end by the Railroad Company's offices) the twenty-five per cent. (25%) hereinbefore specified of balance of tolls. And it is further understood and agreed that in said cities where the Telegraph Company may so establish independent offices, the Railroad Company shall have the right to maintain in its stations and ticket offices telegraph offices for the receipt from the public, but not for the delivery of commercial telegraph business, all commercial telegraph business taken in at any of the offices of the Railroad Company directed to said cities shall be turned over to the Telegraph Company for delivery. It is understood and agreed that the tolls on commercial telegraph business collected by the Railroad Company at its offices in said cities shall be divided in the manner specified in paragraph Second of this agreement.

(2): It is understood and agreed that if the paid commercial messages to and from any railroad telegraph office shall average twelve hundred (1200) messages per month for three consecutive months, the Railroad Company may, if it so elect, call upon the Telegraph Company to establish and maintain an office by means of its own wires apart from the railroad station, at the Telegraph Company's own cost and expense and in that event the Telegraph Company shall so establish and maintain such independent offices.

NINTH: (1) All telegrams pertaining to the business of the Railroad Company between points on the lines of the Railroad Company shall be transmitted by the Railroad Company's own employees on its own telegraph lines.

Answer.

(2): The Telegraph Company agrees to issue cards or books of stamps to such officers and employees of the Railroad Company as may be designated by the proper officers of said company, authorizing the transmission of telegrams relative to the business of the Railroad Company over the lines of the Telegraph Company within the United States to an amount, calculated at the regular day rates of the Telegraph Company not exceeding twelve dollars ($12) per annum for each and every mile of railroad up to two hundred (200) miles on which telegraph wires are operated under this agreement; and not exceeding ten dollars ($10) per annum for each and every mile of railroad over two hundred (200) miles on which telegraph wires are operated under this agreement. The tolls on all such telegrams shall be computed at the regular day rates of the Telegraph Company between the points of origin and destination of such telegrams and the Railroad Company agrees to pay to the Telegraph Company the latter's regular commercial day rates on all such messages in excess of the amount of service above specified, settlement to be made annually.

(3): It is understood and agreed that the service herein provided for applies only to the transmission of messages concerning only the operation and business of the Railroad Company, and moreover, shall not in any case be extended to messages for transmission by ocean cables or by other telegraph companies.

(4): Cards or stamps issued by the Telegraph Company authorizing the transmission of telegrams, when presented at commercial telegraph offices of the Railroad Company, shall be honored and telegrams offered thereunder shall be accepted and transmitted to and from said offices, and no

charge therefor shall be made by the Railroad Company against the Telegraph Company.

(5): The Railroad Company and its employees shall not, without the consent of the Telegraph Company, transmit any messages between points on the Railroad Company's lines and points on the Telegraph Company's lines except those provided for in this agreement.

TENTH: (1) The Railroad Company agrees to issue to such officers and employees of the Telegraph Company as may be designated by the executive officers of the Telegraph Company annual and trip passes or tickets authorizing the free transportation over the lines of the Railroad Company of said officers, employees and laborers of the Telegraph Company when travelling on business in connection with the construction, maintenance or operation of the telegraph line and service upon the Railroad Company's own right of way herein specified and provided for; and further agrees to transport over its lines free of charge to the Telegraph Company all such material and supplies as are required in connection with the construction, maintenance or operation of the telegraph lines and service upon the Railroad Company's own right of way herein specified and provided for.

(2) Said transportation (to be furnished without compensation to the Railroad Company other than the benefits to the Railroad Company of this contract) shall not exceed in any year the amount of telegraph service that the Telegraph Company herein agrees to perform for the Railroad Company and the Telegraph Company hereby agrees to pay to the Railroad Company its regular current transportation rates for such transportation in excess of said amount, settlements to be made annually.

(3) It is understood and agreed that said transportation shall be furnished by the Railroad Company and availed of by the Telegraph Company in accordance with the Interstate Commerce Act of the Federal Congress.

ELEVENTH: The Railroad Company further agrees to transport to and from regular stations over the whole or any part of its railroad all officials, employees, laborers, material or supplies of the Telegraph Company, as desired by the Telegraph Company, in connection with the construction, maintenance or operation of the Telegraph Company's lines and service off the line of the Railroad Company, and the Telegraph Company agrees to pay in cash to the Railroad Company the Railroad Company's regular tariff rates now or hereafter established for all such transportation of men and material; and the Railroad Company shall pay to the Telegraph Company for telegraph service actually rendered hereunder at full rates up to the amount of cash paid by the Telegraph Company to the Railroad Company for the transportation of officials, employees, laborers, materials or supplies of the Telegraph Company, traveling or shipped in connection with the construction, maintenance or operation of the Telegraph Company's lines and service off the line of the Railroad Company the telegraph service so paid for being considered a part of the service (*at $12.00 or $10.00 per mile per annum as aforesaid*), to which the Railroad Company is entitled as hereinabove specified in Paragraph Ninth.

TWELFTH (1): The Railroad Company hereby grants to the Telegraph Company, subject to the terms and conditions hereinafter specified, the right, if it so elects, to erect, maintain and operate at its own cost and expense its wires upon the poles of the Railroad Company, now, or hereafter to be owned or erected by the Railroad Company,

on and along the line of railroad hereinabove specified, and future editions to and extensions thereof.

The Railroad Company hereby grants to the Telegraph Company, its agents and employees, the right to enter at all times upon the Railroad Company's right of way for the purpose of maintaining and repairing the Telegraph Company's said wires upon the poles of the Railroad Company, and also grants to the Telegraph Company the further right for said purpose to run upon the Railroad Company's tracks such hand cars, push cars and motor cars as may be necessary in the erection, maintenance and repair of the Telegraph Company's wires strung upon railroad poles, said cars to be used subject to the regulations of the Railroad Company and in such a manner as not to interfere with the operation of the Railroad Company's trains. The Railroad Company agrees to distribute the material necessary for the erection, maintenance and repair of the Telegraph Company's wires strung upon the Railroad Company's poles in such manner as may be desired by the Telegraph Company, including distribution between stations.

(2) The Railroad Company shall also furnish and erect any additional poles necessary for the proper support of the Telegraph Company's said wires. It being understood and agreed, however, that the Telegraph Company shall not erect more than six (6) wires between any two points on any one line of railroad, without the written consent of the Railroad Company first had in each case.

(3) Said wires of the Telegraph Company shall be erected, maintained and operated as not to interfere with the operation of the Railroad Company's railroad, or with the maintenance and operation of the Railroad Company's telegraph wires.

Answer.

(4) It is understood and agreed that said wires of the Telegraph Company maintained upon the Railroad Company's poles may be connected at the Telegraph Company's expense for the purpose of testing, into such of the Railroad Company's telegraph offices as may be designated by the Telegraph Company, and the Railroad Company agrees to furnish free of cost to the Telegraph Company the services of its employees necessary for the proper testing of said wires at said test office.

(5) The Telegraph Company hereby agrees to pay to the Railroad Company in quarterly installments as rental for said pole space at the rate of four dollars ($4) per mile per wire per annum for the first two wires; three dollars and a half ($3.50) per mile per annum for the third wire; three dollars ($3) per mile per annum for the fourth wire; and two dollars ($2) per mile per annum for all additional wires.

(6) It is understood and agreed as to all pole space upon which the Telegraph Company may elect to occupy on the Railroad Company's poles the Telegraph Company shall pay rental therefor to the Railroad Company for the term of at least five (5) years on each of the Telegraph Company's wires strung upon the Railroad Company's poles (said term beginning on dates when the respective wires are completed) and, thereafter, only during the further term of said occupancy. The Telegraph Company shall have the right at any time to remove any or all of its wires from the Railroad Company's poles.

(7) In the event that the Telegraph Company desires to have the Railroad Company maintain and pay the cost and expense of maintaining the Telegraph Company's wires so erected upon the Railroad Company's poles, the Railroad Company agrees to maintain, at its own cost and expense, any or all of the said wires of the Telegraph Com-

pany, if the Telegraph Company so requires, the Telegraph Company furnishing the necessary material therefor, and the Railroad Company agrees to repair any interruption to said wires of the Telegraph Company so maintained by the Railroad Company with the utmost diligence and promptness, and the Telegraph Company hereby agrees to pay the Railroad Company in quarterly installments as compensation for said maintenance at the rate of one dollar and a half ($1.50) per mile per wire per annum for the first two wires and one dollar ($1) per mile per wire per annum for all additional wires in case the Telegraph Company so desires, as follows:

THIRTEENTH (1): In the event of interruption between any two points to all of the wires belonging to the Railroad Company, the Telegraph Company agrees to allow the Railroad Company the exclusive use of one wire between said points for the handling of telegraph business pertaining strictly to the movement of the Railroad Company's trains, and the operation of its road, provided that at least two (2) of the Telegraph Company's wires shall be in working order.

In the event that all but one of the Telegraph Company's wires are interrupted, the Railroad Company shall have the right to use the working wire jointly with the Telegraph Company and important business of the Railroad Company, relating to the movement of its trains shall have precedent on said wire until one of the Railroad Company's wires shall be restored to working order. The Railroad Company shall then relinquish the Telegraph Company's wire and use its own wire, it being understood that the Railroad Company shall repair with the utmost diligence any interruptions to its own wires.

FOURTEENTH: The Railroad Company agrees

not to assign this agreement, or any part thereof, nor to extend to any telegraph or other company, firm or individual, the benefits thereof, without the consent of the Telegraph Company, party hereto first thereunto had in writing.

FIFTEENTH: The provisions of this agreement shall extend to all the lines of the Railroad Company now or hereafter owned or controlled by the Railroad Company and shall continue in full force and effect for the term of twenty-five (25) years from the date hereof and thereafter until either party shall have given to the other twelve (12) months' written notice of desire or intention to terminate the same.

SIXTEENTH: It is understood and agreed between the parties hereto that material *that the Telegraph Company is herein obligated to furnish* shall be furnished by the Telegraph Company and work on the commercial system of telegraph lines shall be commenced by the Railroad Company within sixty (60) days from the date this agreement becomes effective.

SEVENTEENTH: This agreement shall be binding upon the parties hereto and upon their respective successors and assigns.

IN WITNESSS WHEREOF, the parties hereto have caused these presents to be signed and their corporate seals to be hereunto affixed and attested by their respective officers, duly authorized so to do, the day and year first above written.

POSTAL TELEGRAPH-CABLE COMPANY,

(Sgd.) E. J. NALLY,

(Seal.) Vice-President.

Attest:

J. O. STEVENS,

Secretary.

TONOPAH & TIDEWATER R. R. COMPANY,

(Sgd.) F. M. SMITH,

(Seal.) President.

Attest:
C. B. ZABRISKIE,
Secretary.

Ninth page, paragraph eleventh, second line from bottom, the words "(at $12.00 or $10.00 per mile per annum as aforesaid)" and last page, paragraph sixteenth, second line, the words, "that the Telegraph Company is herein obligated to furnish," inserted before execution. E. J. N.,
C. B. Z.

Judgment.

(Index Number 14,033, Year 1916.)

MUNICIPAL COURT OF THE CITY OF NEW YORK.

BOROUGH OF MANHATTAN—FIRST DISTRICT.

POSTAL TELEGRAPH-CABLE COMPANY, *Plaintiff,*
against
TONOPAH AND TIDEWATER R. R. Co., *Defendant.*

Decision and Judgment. Trial.

I hereby find and decide that the defendant is entitled to judgment dismissing plaintiff's complaint with $5.00 cost after trial and on the merits. Opinion by the Court, and the clerk is hereby directed to enter judgment accordingly.

Ten days stay of execution.

Dated, June 30, 1916.

WAUHOPE LYNN,
Justice.

JUDGMENT.

Judgment is rendered in favor of defendant and against plaintiff for
Dollars, with $5.00 costs and disbursements as taxed, amounting in all to
Dollars ($).

Dated June 30, 1916.

THOMAS O'CONNELL, Clerk.

Case.

MUNICIPAL COURT OF THE CITY OF NEW YORK.
BOROUGH OF MANHATTAN,
FIRST DISTRICT—PART I.

POSTAL TELEGRAPH-CABLE COMPANY, *Plaintiff,* *against* TONOPAH AND TIDEWATER R. R. CO., *Defendant.*	Index Number 14033—1916.

146 Grand Street,
New York, June 21, 1916.

Before:

HON. WAUHOPE LYNN, Justice.

Appearances:

WM. W. COOK, Esq. (Mr. Overbaugh, of Counsel), for the Plaintiff.

MESSRS. STEELE, DEFRIESE & STEELE, (Mr. of Counsel), for the Defendant.

CHARLES PATTERSON BRUCH, called as a witness on the part of the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY PLAINTIFF'S COUNSEL:

Q. What is your name? A. Charles Patterson Bruch.

Q. Where do you live? A. 780 Park Avenue, New York.

Q. Mr. Bruch, are you employed by the plaintiff in this suit? A. Yes, sir.

Q. In what capacity? A. Vice-president.

Q. How long have you been vice-president? A. Over twenty-five years. I beg your pardon, I have not been vice-president over 25 years.

Q. How long? A. Ten or fifteen; I have forgotten.

Q. You have been employed by the plaintiff— A. For over 25 years.

Q. In what other capacities have you served? A. I have been the assistant secretary of the company and the assistant general manager of the company.

Q. Were you ever a telegraph operator yourself? A. Yes.

Q. You are familiar with the telegraph business generally? A. Yes, sir.

PLAINTIFF'S COUNSEL: I offer in evidence ruling of the Interstate Commerce Commission, dated March 28th, 1916.

Paper received and marked "Plaintiff's Exhibit 1."

PLAINTIFF'S COUNSEL: I also offer in evidence ruling of the Interstate Commerce Commission of December 21, 1906, being reported in 12 Interstate Commerce Commission reports, page 10.

Received and marked "Plaintiff's Exhibit 2."

PLAINTIFF'S COUNSEL: I also offer in evidence ruling of the Interstate Commerce Commission of June 3rd, 1907.

Received and marked "Plaintiff's Exhibit 3."

PLAINTIFF'S COUNSEL: I also offer in evidence ruling of the Interstate Commerce Comsion of June 30, 1908.

Received and marked "Plaintiff's Exhibit 4."

Q. Mr. Bruch, what have you to say, if anything, with respect to the attitude of the railroads throughout the United States after the ruling of the Interstate Commerce Commission of December 21, 1906? A. The railroads were governed by that ruling, and declined after that time for about four years—until 1910, to handle for the telegraph companies—free freight, and to transport telegraph men free, even though the contracts between the railroads and the telegraph companies obligated the railroads to carry the men free, except to the extent that the travel was in connection with the lines of the railroads themselves—travel and transportation of freight.

Q. Then do I understand you to say, after that ruling, the railroad companies would not transport telegraph men or materials free under the contracts when the men and material were destined to points beyond the line of that particular railroad? A. That is what I intended to say.

Q. And after that ruling did the railroads throughout the country refuse to carry out the contracts with the telegraph companies in that regard? A. Yes.

Q. Except, I take it, so far as the material or men were to be used or employed on the line of the railroad itself? A. That is right.

Q. And was that in accordance with the ruling of the Commission? A. Yes.

Q. During that time did the railroads offer to compensate telegraph companies for this variation from the contract? A. They did not.

Q. Did the plaintiff, the Postal Telegraph Cable Company, at any time litigate the legality of that ruling of the Interstate Commerce Commission? A. Yes, sir.

Q. And was that question litigated in the suit of Humbird and others against the Chicago Great

Western Railroad Company in the Circuit Court of the United States in Illinois? A. It was.

PLAINTIFF'S COUNSEL: I offer in evidence judgment roll in the suit of John A. Humbird, et al. against the Chicago, Great Western Railway Company, in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Received and marked Plaintiff's Exhibit 5.

PLAINTIFF'S COUNSEL: I offer that judgment roll in evidence as a precedent and also in the nature of being an estoppel as to all the railroads.

Q. Mr. Bruch, did the Western Union Telegraph Company also institute a suit in any place in the United States with respect to the same matter? A. Yes, sir.

Q. To test the legality— A. (Interposing.) Yes, in a case against the Baltimore & Ohio.

Q. That was for the purpose of testing the legality of the then ruling of the Interstate Commerce Commission? A. I believe so.

Q. Was that suit entitled "Western Union Telegraph Company, a corporation, against the Baltimore & Ohio Railroad Company, a corporation, in the District Court of the United States for the District of Maryland"? A. That is the suit.

PLAINTIFF'S COUNSEL: I now offer in evidence the judgment roll in that suit.

Received and marked "Plaintiff's Exhibit 6."

Q. From 1906 to 1910, did the railroads of the United States, on account of this ruling of the Commission, refuse to give telegraph companies the free service called for by the contracts? A. To the extent that I have already explained.

Q. As you have already explained? A. Yes, sir.

Q. And during that time did the railroads take

full advantage of the then ruling of the Interstate Commerce Commission? A. They did.

Q. Mr. Bruch, has the plaintiff accepted the Post Road Act of Congress? A. Yes.

Q. And has the Western Union Telegraph Company also accepted the Post Road Act of Congress? A. Yes, the Western Union also.

PLAINTIFF'S COUNSEL: I offer in evidence the certificate of the Postmaster General, showing acceptance of the plaintiff of the act known as the Post Road Act of Congress of 1866, the acts amendatory thereof and supplementary thereto.

Marked "Plaintiff's Exhibit 7."

DEFENDANT'S COUNSEL: The defence on our part is a contract entered into between the plaintiff and the defendant.

THE COURT: I shall read your answer.

DEFENDANT'S COUNSEL: It is annexed to our answer; I assume that it is introduced at this point.

PLAINTIFF'S COUNSEL: And the testimony now and hereafter to be given is in rebuttal to that defense.

Q. Does this Post Road Act of Congress of July 24, 1866, enable the United States Government to take all the telegraph lines, both of the Postal and Western Union Telegraph Companies, at any time at an appraised value? A. It does.

Q. Is that one of the provisions of Section 5267 of the Revised Statutes of the United States which contains this Post Road Act of Congress? A. Yes.

Q. Mr. Bruch, as bearing upon the question whether the Interstate Commerce Commission in making its ruling of March 28th, 1916, committed abuse of discretion, constituting legal error, and also as bearing upon the principle of law that all

statutes including the Interstate Commerce Acts are to be construed most favorably to the interests of the public so far as it is consistent with the terms thereof, I would ask you whether, in case the United States Government should at any time hereafter exercise its power under the Post Road Act of Congress to take over the telegraph lines of the Postal and Western Union, the Government would have to pay a very much larger price if these railroad-telegraph contracts for the rendering of free telegraph service and free railroad service should continue, and other similar contracts made in the future? A. Yes, sir; in my opinion it would be a very much higher price.

Q. On the other hand, Mr. Bruch, if the Interstate Commerce Act as construed by the Commission in its ruling of March 28th, 1916, sustains that ruling, what would be the effect upon the price which the United States Government would have to pay for these telegraph lines hereafter in case the Government takes them over? A. The price would be less.

Q. What reason have you for saying this? A. From the experience of the British Post Office when it took over the telegraph lines about—in 1870.

Q. Do I understand you to say that the British Government took over the telegraph lines in that country about 1870? A. In or about 1870; my recollection is about 1870.

Q. (Handing paper.) Have you a copy of the act of Parliament authorizing the British Government to take over the telegraph lines in Great Britain? A. Yes, I have it here.

Q. I refer now to the act of Parliament of July 31, 1868, being 31 and 32 Victoria, page 887, and so forth, entitled "An act to enable Her Majesty's Postmaster General to acquire, work and maintain

electric telegraphs". Have you that act before you? A. I have it here.

PLAINTIFF'S COUNSEL: Now I offer in evidence Section "9" of that Act.

Received and marked "Plaintiff's Exhibit 8."

Q. I show you the bluebook, Mr. Bruch, issued by the British Government, ordered printed by the House of Commons on August 1st, 1911, and I ask you what that pertains to? A. It is a report from the Select Committee on the Telegraph Bill.

Q. Does it also contain the minutes of the evidence? A. It does.

Q. Is that an official document issued by the British Government? A. Yes, published by the Government.

PLAINTIFF'S COUNSEL: Now, I offer in evidence portion of the testimony of Sir Robert Hunter of July the 25th, 1911, as the same appears on pages 1, 2 and 3 of bluebook; and I would ask the stenographer to mark by a scroll that portion thereof which is now offered in evidence.

Received and marked "Plaintiff's Exhibit 9."

Q. Will you also turn to page 59 of that same bluebook and state whose testimony you find there? Is that the testimony of Sir Henry Norman? A. Yes, sir; it is the testimony of Sir Henry Norman.

PLAINTIFF'S COUNSEL: I offer in evidence that portion of Sir Henry Norman's testimony as indicated on page 59 of the bluebook, being Plaintiff's Exhibit 9.

Received and marked "Plaintiff's Exhibit 10."

PLAINTIFF'S COUNSEL: I also offer in evidence extracts from pages 410 and 411 of vol-

ume 31 of the Interstate Commerce reports.

Received and marked "Plaintiff's Exhibit 11."

Q. Mr. Bruch, have you with you the reports of the Postmaster General of Great Britain bearing upon the results of the operation by the British Government of the telegraph lines of that country from and including the year 1898? A. I have those reports in my hand.

Q. Have you studied those reports and are you able to state the results? A. Yes. and I have drawn off some figures in the shape of a table.

Q. You have tabulated them, have you? A. A tabulation of the figures.

Q. Is that tabulation correct? A. It is a tabulation of the operation of the British Government telegraphs.

Q. And it is in accordance with the figures found in those reports? A. Yes, sir.

Q. Is that the tabulation which you have made? A. This is it.

PLAINTIFF'S COUNSEL: I offer it in evidence.

Received and marked "Plaintiff's Exhibit 12."

Q. Mr. Bruch, as a telegraph man who has passed all his life in the telegraph business, both in the operation and administration, I would ask you whether, in your opinion, this large deficit in the operation of the British telegraph lines is due in large part to the railroad telegraph contracts existing between the telegraph companies and the railroad companies in Great Britain at the time the British Government took over the telegraph lines? A. Yes, that is my opinion.

Q. Mr. Bruch, you will notice that this recent ruling of the Interstate Commerce Commission of March 28th, 1916, involved in this suit, compels

the telegraph companies to pay the railroad companies on all freight and passenger service, except as the same are incurred in connection with the telegraph line along the particular railroad involved. I wish you would state in a general way how important that phase of the ruling is to the telegraph companies themselves? A. It is very important; it involves very large sums of money.

Q. Now you can explain briefly, if you will, how that is? A. Because the telegraph freight and material which has to be shipped by railroad is very large in amount and has to be shipped over long distances on account of the nature of the business.

Q. For instance, do telegraph poles have to be shipped from the timber country to points where there is no timber? A. I was going to mention that; I have here an instance—two instances—where we were obliged to ship poles, where the company was obliged to ship poles from a very considerable distance from where the poles were drawn and cut, the timber country, to where they were to be put up and used in a country where there was no timber.

Q. Used in the construction of the telegraph lines? A. Used in the construction of a line. In our construction of the line between Salt Lake and Reno, for the distance of about 476 miles, the poles cost us in the timber country $1 a pole, and the freight on them averaged $1.50 per pole. Now we used 20,160 split poles, which cost us cut, the poles themselves, $20,160.

Q. What did the freight on that cost? A. The freight cost us $30,240, an excess cost of freight over the cost of the poles themselves of $10,080. We had another case where we were reconstructing our line on the Santa Fe Railroad from Raton, New Mexico, to Lamy, New Mexico, a distance of 184 miles.

Q. That is the distance you had to haul poles? A. No, between those two points, in that distance we used 4,830 poles. We bought them in Oregon at $1 apiece and they cost us delivered $3.42 apiece. That is the aggregate amount—

Q. Just a moment. What was the cost of the poles in Oregon? A. I didn't get you.

Q. I say, what was the cost, therefore, of the poles in Oregon? A. The cost in Oregon was $4,830, $1 apiece. The cost of transportation made the value or the cost to us of the pole when it reached its destination $3.42, that is, including costs and freight.

Q. What was the actual freight cost on those poles? A. The actual freight was $11,688.60; that is $6,858.60 more than the poles themselves cost.

Q. Did you take those figures from the actual reports relating to that work? A. Yes, I took them from the actual reports.

Q. And they are accurate? A. And they are accurate.

Q. In addition to freight, what have you to say with respect to passenger force? A. The same thing is true. We have occasion in our business to travel very extensiely and over long distances. Our officers travel and our men travel in connection with the operation and construction and so forth of our lines and our plant.

Q. For instance, take an instance of the Illinois Central Railroad. Does the contract between the Postal Telegraph Cable Company and the Illinois Central Railroad require that company to transport our men free of charge over the lines of that railroad company, even though the men are doing work or are about to do work off the line of that railroad? A. Yes, that is the obligation of that contract upon the railroad.

Q. Now, under this recent ruling of the Interstate Commerce Commision, would all that free service on the part of the railroad company be cut

off if this ruling is sustained? A. It would.

Q. And with respect to passengers and men, would that also amount to a large sum, as well as freight? A. I was speaking of passengers just now.

Q. I say, would that aggregate a large sum for passengers? A. As to the telegraph service throughout the country? Yes, very large.

Q. And that same condition applies not only to the plaintiff but to the Western Union, I take it? A. Yes, sir.

Q. And applies throughout the United States? A. Yes, generally.

Q. To both companies? A. To both companies.

Q. I understand you to say that our men and especially the officers, sometimes have occasion to travel long distances, to reach the point where they are compelled to work upon the telegraph lines? A. Yes, sir.

THE COURT: Why so elaborate in this matter?

PLAINTIFF'S COUNSEL: I want to make a record. I am about through now.

Q. Can you say exactly how much these passenger force and freight bills would amount to which the telegraph companies will now have to pay for instead of getting free under the old time contracts—can you say how much that would amount to in exact figures? A. No, it would be impossible for me—

Q. Would it be a large or a small amount? A. It would be a very large amount; impossible to say exactly how much.

Q. Would all of that be lost to the telegraph companies if the present ruling of the Interstate Commerce Commission is sustained? A. It would.

DEFENDANT'S COUNSEL: No cross examination.

PLAINTIFF'S COUNSEL: That is our case.

THE COURT: Let us hear the defense.

DEFENDANT'S COUNSEL: The defense is very simple. We admit all the allegations of the complaint. Our defense is, the provisions of the contract entered into between the Postal Telegraph Company and the Tonopah & Tidewater Railroad Company on the 20th of June, 1897, whereby the telegraph company agreed to send messages having to do with the business of the railroad company, free of charge, anywhere in the United States up to a certain amount. There is no allegation that we have exceeded that amount and I think it is admitted by the complaint that messages were sent in connection with the railroad business. On that ground we ask that the complaint be dismissed as there are no—we are free from paying for these services by contract. A true copy of the contract is annexed to the answer, and I think that it is admitted to be a true copy of the contract.

THE COURT: You are submitting that contract in evidence?

DEFENDANT'S COUNSEL: It has been offered in evidence.

THE COURT: You had better send me a memorandum if you care to. June 28th for any briefs that you want to submit in the matter.

PLAINTIFF'S COUNSEL: Do I understand that the contract is in evidence?

DEFENDANT'S COUNSEL: It is assumed to be in evidence, a copy is annexed to the answer.

THE COURT: Better put a copy of the contract in evidence.

Copy of contract is received and marked "Defendant's Exhibit A."

Exhibits returned to counsel.

Exhibits.

Plaintiff's Exhibit No. 1 is the ruling of the Interstate Commerce Commission of March 28th, 1916.

Plaintiff's Exhibit No. 2 is the ruling of the Interstate Commerce Commission of December 21st, 1906.

Plaintiff's Exhibit No. 3 is the ruling of the Interstate Commerce Commission of June 3rd, 1907.

Plaintiff's Exhibit No. 4 is the ruling of the Interstate Commerce Commission of June 30th, 1908.

Plaintiff's Exhibit No. 5 is the judgment roll in the suit of John A. Humbird et al against Chicago and Greatwestern Railway Company in the Circuit Court of the United States for the Northern District of Illinois Eastern Division.

Plaintiff's Exhibit No. 6 is the judgment roll in the suit of Western Union Telegraph Company against Baltimore & Ohio Railroad Company in the District Court of the United States for the District of Maryland.

Plaintiff's Exhibit No. 7 is the certificate of the Postmaster-General of the United States showing that the plaintiff has duly accepted the terms of the Post Road Act of Congress or 1866 and the Acts amendatory thereof and supplemental thereto.

Plaintiff's Exhibit No. 8 is Section 9 of the Act of the English Parliament of July 31, 1868, entitled "An Act to enable her Majesty's Postmaster-General to acquire, work and maintain electric telegraphs", being 31 and 33 Victoria 887, etc.

Plaintiff's Exhibit 9 is a portion of the testimony of Sir Robert Hunter of July 25th, 1911, the same appearing on pages 1, 2 and 3 of the Blue Book issued by the British Government and ordered printed by the House of Commons on

August 1, 1911, and containing the report of a select Committee on the Telegraph Bill.

Plaintiff's Exhibit No. 10 is a portion of the testimony of Sir Henry Norman, appearing on page 59 of the above mentioned Blue Book.

Plaintiff's Exhibit No. 11 is extracts from pp. 410 and 411 of Vol. 31 of the Interstate Commerce Commission Reports.

Plaintiff's Exhibit No. 12 is the tabulation made by the plaintiff's witness Mr. Bruch, showing certain results of the operation of the telegraph lines by the British Government and based upon reports of the British Postmaster-General.

Defendant's Exhibit A is the contract between the plaintiff and defendant, a copy of which is attached to the defendant's answer and heretofore printed in full in this record.

Opinion.

MUNICIPAL COURT OF THE CITY OF NEW YORK.

BOROUGH OF MANHATTAN, FIRST DISTRICT.

POSTAL TELEGRAPH-CABLE COMPANY,
Plaintiff,
against
TONOPAH AND TIDEWATER RAILROAD COMPANY,
Defendant.

This case, although involving only a small sum of money, involves a very important question of law. There is no conflict as to the facts, and hence that question of law stands out clear and distinct. It is whether the Interstate Commerce Act of Congress, as construed by the Interstate Commerce Commission in its ruling of March 28th, 1916, is constitutional under the Constitution of the United States, as applied to the contract in evidence in this case, between the plaintiff and defendant, made prior to the Act of Congress of June 18th, 1910, which placed telegraph companies within the Interstate Commerce Act. In other words, could an Act of Congress constitutionally abrogate the so-called free telegraph service to be given by the plaintiff to defendant under the terms of that contract? I think that the contract is a bar to recovery in this suit, and that that provision of the Interstate Commerce Act as construed by the Interstate Commerce Commission, which prevents the rendering of the so-called free telegraph service by plaintiff to defendant in accordance with such contract, is unconstitutional and accordingly I direct judgment for the defendant.

WAUHOPE LYNN,
Justice.

Stipulation.

IT IS HEREBY STIPULATED that the foregoing consists of true and correct copies of the notice of appeal and of all the papers used before the court on the trial from which this appeal is taken, and the whole thereof with the exception of the Stenographer's Minutes, which are now on file in the office of the Clerk of the Municipal Court of the City of New York, Borough of Manhattan, First District, and certification thereof is hereby waived.

IT IS FURTHER STIPULATED that the exhibits in this case may be produced upon the appeal with the same force and effect as though they were attached to the case on appeal, and such exhibits shall be considered as a part of the record.

Dated, New York, July 5th, 1916.

WILLIAM W. COOK,
Attorney for Plaintiff.

STEELE, DEFRIESE & STEELE,
Attorneys for Defendant.

Stipulation Settling Case.

IT IS HEREBY CONSENTED that the within case on appeal be filed as settled, and notice of settlement thereof is hereby waived.

Dated, New York, July 5th, 1916.

WILLIAM W. COOK,
Attorney for Plaintiff.

STEELE, DEFRIESE & STEELE,
Attorneys for Defendant.

Order of Affirmance.

At a Term of the Supreme Court held for the hearing of appeals from the City and Municipal Courts of the First Judicial Department at the County Court House, in the City of New York, Borough of Manhattan, on the 2nd day of November, 1916.

Present:

Hon. CHARLES L. GUY,
Hon. NATHAN BIJUR,
Hon. CLARENCE J. SHEARN,
Justices.

POSTAL TELEGRAPH-CABLE COMPANY, *Plaintiff-Appellant,* *against* TONOPAH AND TIDEWATER RAILROAD COMPANY, *Defendant-Respondent.*	Order of Affirmance of a judgment of the Municipal Court, October, No. 86.

The above named plaintiff having appealed to the Supreme Court from a judgment of the Municipal Court of the City of New York, Borough of Manhattan, First District, rendered on the 30th day of June, 1916, and the said appeal having been heard, and due deliberation having been had thereon, it is

ORDERED AND ADJUDGED, that the judgment of the said Municipal Court be and the same is hereby affirmed with costs to the respondent, with leave to the plaintiff to appeal to the Appellate

Division, First Department.

Enter:

CHARLES L. GUY,
Justice Supreme Court sitting in App. Term.

NATHAN BIJUR,
Justice Supreme Court sitting in App. Term.

CLARENCE J. SHEARN,
Justice Supreme Court sitting in App. Term.

Judgment of Affirmance.

MUNICIPAL COURT OF THE CITY OF NEW YORK.
BOROUGH OF MANHATTAN—FIRST DISTRICT.

POSTAL TELEGRAPH CABLE COMPANY,
Plaintiff,
against
TONOPAH AND TIDEWATER RAILROAD COMPANY,
Defendant.

1916, Nov. 2. Judgment affirmed with $25.00 costs to Respt. with leave to the Plft. to appeal to the App. Div., First Dept.

Affidavit of no Opinion.

SUPREME COURT.

APPELLATE DIVISION—FIRST DEPARTMENT.

POSTAL TELEGRAPH-CABLE COMPANY,

Plaintiff-Appellant,

against

TONOPAH AND TIDEWATER RAILROAD COMPANY,

Defendant-Respondent.

STATE OF NEW YORK,
COUNTY OF NEW YORK. } ss.:

WILLIAM W. COOK, being duly sworn, deposes and says that he is the attorney for the plaintiff-appellant herein; that no opinion was handed down by the Justices of the Appellate Term upon the affirmance of the judgment of the Municipal Court herein.

WILLIAM W. COOK.

Sworn to before me this
day of November, 1916.

Richard T. Thompson,
Notary Public, Kings County No. 22
Certificate Filed in New York County No. 46.

Stipulation with Respect to Exhibits.

IT IS HEREBY STIPULATED that the Exhibits in this case may be produced upon the appeal in the Appellate Division with the same force and effect as though they were attached to the case on appeal therein, and such Exhibits shall be considered as a part of this record.

Dated, New York, November 10, 1916.

STEELE, DEFRIESE & STEELE,
Attorney for Plaintiff.

STEELE, DEFRIESE & STEELE,
Attorneys for Defendant.

Stipulation Waiving Certification.

SUPREME COURT.

APPELLATE DIVISION—FIRST DEPARTMENT.

POSTAL TELEGRAPH-CABLE COMPANY,

Plaintiff-Appellant,

against

TONOPAH AND TIDEWATER RAILROAD COMPANY,

Defendant-Respondent.

Pursuant to §3301 of the Code of Civil Procedure it is hereby stipulated that the foregoing consists of true and correct copies of the record on appeal to the Appellate Term, of the order of affirmance of the judgment of the Municipal Court, and of the whole thereof now on file in the office of the Clerk of the County of New York, and of the judgment of affirmance entered in the office of the Clerk of the Municipal Court of the City of New York, Borough of Manhattan, First District, and of the whole thereof, and certification thereof by the Clerk pursuant to §1353 of the Code of Civil Procedure is hereby waived.

Dated, New York, November 10, 1916.

WILLIAM W. COOK,
Attorney for Plaintiff-Appellant.

STEELE, DEFRIESE & STEELE,
Attorneys for Defendant-Respondent.

47 At a Term of the Appellate Division of the Supreme Court, Held in and for the First Judicial Department in the County of New York, on the 26th day of January, 1917.

Present: Hon. John Proctor Clarke, Presiding Justice; Frank C. Laughlin, Victor J. Dowling, Walter Lloyd Smith, Alfred R. Page, Justices.

6.5.

Postal Telegraph-Cable Company, App'l't,

vs.

Tonopah and Tidewater Railroad Company, Resp't.

Affirmance of Order.

An appeal having been taken to this court by the plaintiff from a determination of the Supreme Court, Appellate Term, entered on the 2nd day of November, 1916, affirming a judgment of the Municipal Court, Borough of Manhattan, First District, entered on the 30th day of June, 1916, and from the judgment of said Municipal Court thereupon entered on the 2nd day of November, 1916.

And said appeal having been argued by Mr. William W. Cook, of counsel for the appellant, and by Mr. Porter Steele, of counsel for the respondent, and due deliberation having been had thereon,

It is hereby unanimously ordered that the determination and judgment so appealed from be and the same are hereby affirmed with costs and disbursements.

And it is hereby further unanimously ordered that leave to appeal from this order to the Court of Appeals be and the same hereby is denied.

Enter,

J. P. C.

[Endorsed:] Postal Telegraph-Cable Company, App'l't, vs. Tonopah and Tidewater Railroad Co., Resp't. Copy. Order of Affirmance by Appellate Division.

48 Supreme Court of the State of New York, Appellate Division, First Department.

POSTAL TELEGRAPH-CABLE COMPANY, Plaintiff-Appellant,

against

TONOPAH AND TIDEWATER RAILROAD COMPANY, Defendant-Respondent.

To the Hon. John Proctor Clarke, presiding Justice of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department:

The petition of the Postal Telegraph-Cable Company respectfully shows:

1. That your petitioner at and during all the times mentioned in the record herein was and now is a domestic telegraph corporation of the State of New York doing business as such between points within the state of New York and points in other states, and was and now is subject to the provisions of the Act of Congress of February 4th, 1887, known as an Act to Regulate Commerce, and the Acts amendatory thereof and supplementary thereto.

2. That this action was commenced in the Municipal Court of the City of New York to recover the regular tolls on telegrams which had been handed by the defendant to the plaintiff for regular transmission to various points in the United States and had been charged by plaintiff to defendant on the books of the plaintiff. That the regular tolls on such telegrams for the period covered by such complaint were $7.32.

49 3. In its answer the defendant admitted the transmission of said telegrams and the accuracy of said charges but alleged the reason the defendant refused to pay therefor was on account of a contract between plaintiff and defendant by which said telegrams would be transmitted by plaintiff without pay except in consideration of the provisions of said contract, a copy of which was attached to the answer.

4. On the trial the contract was introduced in evidence by the defendant. The plaintiff introduced in evidence a ruling of the Interstate Commerce Commission of March 28th, 1916, to the effect that such telegrams must be paid for by the Railroad Company in cash or by an equivalent amount of railroad transportation notwithstanding such a contract as is mentioned above, said ruling of said commission being its construction of the Act of Congress aforesaid. Other testimony and documentary evidence was introduced in evidence by plaintiff to sustain such ruling of the Commission.

5. The learned Judge of the Municipal Court however, rendered judgment for the defendant on the ground that the Interstate Commerce Act as construed by the Interstate Commerce Commission was unconstitutional as so construed. Thereupon plaintiff, your petitioner, duly appealed to the Appellate Term of the Supreme Court

of the State of New York for the First Judicial District and said Appellate Term duly affirmed the said judgment of the said Municipal Court with leave to appeal to this Appellate Division, without writing an opinion setting forth its reasons therefor, but with permission to plaintiff to appeal to the Appellate Division. Thereafter and
50 on the 2nd day of November, 1916, judgment was entered in the said Municipal Court *from* the said order and determination of said Appellate Term in favor of the defendant against the plaintiff, your petitioner. Thereupon the plaintiff, your petitioner, duly appealed to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department from the order and determination of the Appellate Term aforesaid, and said Appellate Division duly affirmed the said order and determination of said Appellate Term without writing an opinion setting forth its reasons therefor. Thereafter and on January 26th, 1917, judgment was entered in the Municipal Court of the City of New York, *from* the said order and determination of the said Appellate Division in favor of the defendant against the plaintiff, your petitioner. Under the statutes of the State of New York in such case made and provided no appeal could be taken to a higher court than this Appellate Division of the State of New York without such leave to appeal. That the above mentioned orders and judgments were in the highest court of New York State in which a decision in this suit could be had.

6. Your petitioner further respectfully shows to the court that in the record and proceedings had in the above entitled action, and also in the rendition of the final order and judgment in the Appellate Division and Appellate Term of the Supreme Court and the Municipal Court of the City of New York, there was drawn in question the validity of a statute of or an authority exercised under the United States and a title, right, privilege and immunity specially set
51 up and claimed by your petitioner under a statute of the United States; namely, the Act to Regulate Commerce of February 4, 1887, and the acts amendatory thereof and supplementary thereto, and that the decisions of the said courts were adverse to their validity and such title, right, privilege and immunity so set up and claimed by your petitioner under said statute. Your petitioner claimed a title, right and privilege or immunity under a Commission held or authority exercised under the United States, and the decisions mentioned above were against the title, right, privilege or immunity especially set up or claimed by your petitioner under such Commission or authority.

7. Your petitioner further respectfully shows that on the record and proceedings herein there is manifest error and your petitioner attaches hereto and makes a part hereof its assignments of such errors.

Wherefore your petitioner prays that a Writ of Error may be allowed to issue from the Supreme Court of the United States to the Appellate Division of the Supreme Court of the State of New York, in the First Judicial District in order that the errors set forth may be corrected and that the decision and judgment may be reversed and

that a duly authenticated transcript of the record and proceedings herein may be sent to the Supreme Court of the United States.

WILLIAM W. COOK,
Attorney for Plaintiff-Appellant.

Office and Post Office Address, 44 Wall Street, Borough of Manhattan, New York City.

52 Supreme Court, Appellate Division, First Department.

POSTAL TELEGRAPH-CABLE COMPANY, Plaintiff-Appellant,

against

TONOPAH AND TIDEWATER RAILROAD COMPANY, Defendant-Respondent.

Now comes the plaintiff-appellant (plaintiff in error) in the above entitled case and in connection with its petition for a writ of error from the Supreme Court of the United States, makes this its assignment of errors.

1. The Appellate Division of the Supreme Court of the State of New York for the First Judicial District erred in affirming the determination, order and judgment of the Appellate Term and Municipal Court of the City of New York.

2. The said Appellate Division erred in not reversing the said determination, order and judgment of the Appellate Term and Municipal Court.

3. The said Appellate Division erred in failing to hold that the agreement entered into between the plaintiff and the defendant June 26, 1907, which purported to obligate the plaintiff to transmit interstate telegrams was therefore subject to the provisions of the Act of Congress approved February 4, 1887, known as the Act to Regulate Commerce and the Acts amendatory thereof and supplementary thereto, and in particular the Act of Congress approved June 18, 1910.

53 4. The said Appellate Division erred in holding that on and after June 18, 1910, it was not unlawful and violative of the said Acts of Congress for the plaintiff to transmit for defendant interstate telegrams without being paid therefor except in accordance with the terms of said contract.

5. The said Appellate Division erred in holding that the plaintiff is not entitled to recover from defendant the regular rates for the transmission of said interstate telegrams, namely, Seven and 32/100 Dollars ($7.32) the amount sued for.

6. The said Appellate Division erred in holding that the enactment and going into effect of the Act of Congress hereinbefore mentioned, approved June 18, 1910, did not operate as a cancellation of the said contract between the parties to the above entitled action so far as said contract required plaintiff to transmit said telegrams without collecting the regular tolls therefor.

7. The said Appellate Division erred in holding that the enact-

ment and going into effect of the Act of Congress hereinbefore mentioned, approved June 18, 1910, did not exonerate, excuse, and release the plaintiff from any continued, further or additional obligation to the defendant under or in respect of said contract between the parties to the above entitled action so far as the transmission of interstate telegrams was and is concerned.

8. The said Appellate Division erred in sustaining the decision of the said Appellate Term and Municipal Court that said Act of Congress approved February 4, 1887, as so construed by the Interstate Commerce Commission, was and is unconstitutional.

54 9. By reason and in view of the enactment and going into effect of the Act of Congress ap-roved June 18, 1910, hereinbefore mentioned, said Appellate Division erred in holding in this action plaintiff was not entitled to recover the regular tolls on said interstate telegrams.

Wherefore, the Postal Telegraph-Cable Company prays that said judgment, final order and determination may be reversed, annulled and set aside, and that the plaintiff-appellant be restored to all things which it has lost because of said judgment, final order and determination.

WILLIAM W. COOK,
Attorney for Plaintiff-Appellant.

Office and Post Office Address, 44 Wall Street, New York City.

STATE OF NEW YORK,
County of New York, ss:

Edward Reynolds, being duly sworn says that he is an officer of the Postal Telegraph-Cable Company, your petitioner above named, to wit, a Vice President thereof; that the foregoing petition is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

EDWARD REYNOLDS.

Sworn to before me this 29th day of January, 1917.

[Seal Robert J. Hall, Notary Public, Kings County, N. Y.]

ROBERT J. HALL,
Notary Public, Kings County, No. 65;
Certificate Filed in N. Y. Co., No. 136.

55 [Endorsed:] Co. Clk's Index No. 32562-16. Supreme Court, Appellate Division, First Department. Postal Telegraph-Cable Company, Plaintiff-Appellant, against Tonopah and Tidewater Railroad Company, Defendant-Respondent. Original. Petition for Writ of Error and Assignment of Errors. William W. Cook, Attorney for Plaintiff-Appellant, 44 Wall Street, New York

City. Service of a copy of the within papers is hereby admitted. Dated, New York, Jan'y 29, 1917. Steele, De Friese & Steele, Att'ys for Defendant-Respondent.

56 Supreme Court, Appellate Division, First Department.

POSTAL TELEGRAPH-CABLE COMPANY, Plaintiff-Appellant,

against

TONOPAH AND TIDEWATER RAILROAD COMPANY, Defendant-Respondent.

The above entitled matter coming on to be heard upon the petition of the appellant herein for a Writ of Error from the Supreme Court of the United States to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department, and upon an examination of the said petition and the record in the said matter,

It is ordered, that a Writ of Error be, and hereby is, allowed to this court from the Supreme Court of the United States and that the petitioner file a bond in amount of $250.

Granted this 29th day of January, 1917.

JOHN PROCTOR CLARKE,
Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, First Judicial District.

57 [Endorsed:] Co. Clk. Index No. 32,562-16. Supreme Court Appellate Division, First Department. Postal Telegraph-Cable Company, Plaintiff-Appellant, against Tonopah and Tidewater Railroad Company, Defendant-Respondent. Order Allowing Writ of Error. William W. Cook, Attorney for Plaintiff-Appellant, 44 Wall Street, New York City. Service of a copy of the within proposed order is hereby admitted. Dated, New York, Jan'y 29, 1917. Steele, De Friese & Steele, Att'y- for def't-respon't.

58 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of New York constituting the Appellate Division for the First Judicial District and Department, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea in the Appellate Division of the Supreme Court of the State of New York, for the First Judicial Department, being the highest court of law of the said state in which a decision could be had in said suit between Postal Telegraph-Cable Company, plaintiff, and Tonopah and Tidewater Railroad Company, defendant, wherein was drawn in question the construction of a statute of the United States, and the decision was against the title, right, privilege and immunity specially set up or claimed under such statute,

a manifest error hath happened, to the great damage of the said Postal Telegraph-Cable Company, as by its petition appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right
59 and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 30th day of January 1917.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk of the United States District Court for the Southern District of New York.

Allowed this 31st day of Jan. 1917.
JOHN PROCTOR CLARKE,
Presiding Justice of the Appellate Division of the Supreme Court, First Department.

60 [Endorsed:] In the Supreme Court of the United States. M 2-143. Postal Telegraph-Cable Company, Plaintiff-in-Error, against Tonopah and Tidewater Railroad Company, Defendant-in-Error. Writ of Error. William W. Cook, Att'y for Plaintiff-in Error, Office & P. O. Address: 44 Wall-street, N. Y. City. Service of a copy of the within writ of Error is hereby admitted. Dated, New York, ——.

61 UNITED STATES OF AMERICA, *ss:*

To Tonopah and Tidewater Railroad Company, Greeting:

You are hereby cited and admonished to appear at the Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of New York for the County of New York, wherein the Postal Telegraph-Cable Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. John Proctor Clarke, Presiding Justice of the Appellate Division of the Supreme Court of the State of New York

for the First Judicial Department, this 31st day of January, in the year of our Lord One Thousand Nine Hundred and Seventeen.

JOHN PROCTOR CLARKE,
Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, First Department.

62 [Endorsed:] Supreme Court of the United States. County Clerk's index No. 32562, Year 1916. Postal Telegraph-Cable Company, Plaintiff-in-Error, against Tonopah and Tidewater Railroad Company, Defendant-in-Error. (Original.) Citation. William W. Cook, Att'y for Plaintiff, 44 Wall-street, Manhattan, N. Y. City. Service of a copy of the within Citation is hereby admitted. Steele, De Friese & Steele, Att'y- for defendant in error. Dated, Jan. 31, 1917.

63 American Surety Company of New York.

Capital $5,000,000.

Company's Office Building, 100 Broadway New York.

Appellate Division of the Supreme Court for the First Department.

POSTAL-TELEGRAPH CABLE CO., Plaintiff and Appellant,
against
TONOPAH & TIDEWATER RAILROAD COMPANY, Defendant and Respondent.

Whereas, the Postal-Telegraph Cable Co. Plaintiff and Appellant feeling aggrieved by the order of the Appellate Division of the Supreme Court for the First District, dated — affirming the judgment of the Supreme Court, State of New York dismissing the complaint herein, desires to appeal therefrom to the Supreme Court of the United States of America.

Now, therefore, the American Surety Company of New York, having an office and principal place of business at No. 100 Broadway, in the City of New York, does hereby pursuant to the Statute in such case made and provided, undertake that the appellant will pay all costs and damages which may be awarded against the appellant on said appeal not exceeding Two Hundred Fifty Dollars ($250.00).

Dated, New York January 30th, 1917.

AMERICAN SURETY COMPANY
OF NEW YORK,
By W. H. E. REINECKE,
Resident Vice-President.

Attest:
[L. S.] LOUIS PAPEN,
Resident Assistant Secretary.

64 STATE OF NEW YORK,
County of New York, ss:

On this day of Jan. 30, 1917, before me personally appeared W. H. E. Reinecke, Resident Vice President of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say: that he resides in the City of New York, N. Y.; that he is the Resident Vice President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knows the corporate seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said Corporation, and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said W. H. E. Reinecke further said that he is acquainted with Louis Papen and knows him to be one of the Resident Assistant Secretaries of said Corporation; that the signature of said Louis Papen subscribed to the said instrument is in the genuine handwriting of the said Louis Papen and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him the said W. H. E. Reinecke, Resident Vice President.

[L. S.] W. C. LLOYD,
Notary Public, Kings County.

Ctf. Filed in N. Y. Co., N. Y. Co. No. 84, Kings Co. No. 19, Kings Co Reg. No. 8021, N. Y. Co. Reg. No. 8059, Certificates filed in all Counties. Term expires March 30th, 19—.

Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 16, 1917, at twelve o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees, American Surety Company of New York.

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company, at their meeting held Tuesday, December 12, 1916, for the purpose of nominating * * * Officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

"We nominate for * * *

Place.
New York, N. Y.

Resident Vice-Presidents.	Resident Assistant Secretaries.
Marshall L. Brower.	Marshall L. Brower.
A. E. Cotterell.	William H. Bishop.
William M. Tomlins, Jr.	A. E. Cotterell.
Lester S. Moore.	Charles S. Waterbury.
William H. Bishop.	Daniel Stewart.
George R. Crosby.	E. D. Sadler.
W. H. E. Reinecke.	George R. Crosby.
E. D. Sadler.	W. H. E. Reinecke.
	E. J. Sabater.
	Louis Papen.
	Benjamin A. Willis.
	Robert L. Neptune.
	Peter H. May.

* * * * * * *

"Whereupon, it was

"Resolved, That the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

"The following resolution was adopted:

"Resolved, That the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by a Resident Assistant Secretary."

* * * * * * *

STATE OF NEW YORK,
County of New York, ss:

I, W. H. Riley, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Com-

pany, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 23rd day of January, 1917.

(Signed) W. H. RILEY,
Assistant Secretary.

[L. S.]

65 [Endorsed:] Appellate Division of the Supreme Court for the First Department. 576. Postal-Telegraph Cable Co. Plaintiff & Appellant against Tonopah & Tidewater Railroad Company, Defendant & Respondent. Undertaking on Appeal. I approve of the within undertaking both as to form and sufficiency of the surety. John Proctor Clarke, Presiding Justice. Filed Jan. 31, 1917. Alfred Wagstaff, Clerk.

66 Supreme Court, Appellate Division, First Department.

POSTAL TELEGRAPH-CABLE COMPANY, Plaintiff-Appellant,

against

TONOPAH AND TIDEWATER RAILROAD COMPANY, Defendant-Respondent.

STATE OF NEW YORK,
County of New York, ss:

William W. Cook, being duly sworn, deposes and says that he is an attorney and counsellor at law, at New York City, and is attorney for the plaintiff-appellant herein, and that no opinion was handed down by the Justices of the Appellate Division upon the affirmance of the judgment of the Appellate Term herein.

WILLIAM W. COOK.

Sworn to before me this 31st day of January, 1917.

[Richard T. Thompson, Notary Public, Kings County.]

RICHARD T. THOMPSON,
Notary Public, Kings County, No. 22;
Certificate Filed in New York County, No. 46.

[Endorsed:] Postal v. Tonopah. Original. Affidavit of no opinion.

67 UNITED STATES OF AMERICA:

Appellate Division of the Supreme Court, First Judicial Department.

Clerk's Office.

COUNTY OF NEW YORK,
State of New York, ss:

I, Alfred Wagstaff, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages numbered 1 to 47 inclusive contain a true and complete transcript of the record and proceedings had in the cause of Postal Telegraph Cable Company, plaintiff and appellant in said Court, and plaintiff in error in the United States Supreme Court, against the Tonopah and Tidewater Railroad Company, defendant and respondent in the said first named court, and defendant in error in the United States Supreme Court, as the same remain of record and on file in said office and that the same together with the annexed original petition for writ of error, and assignment of errors, order granting writ of error, writ of error, the original citation to the defendant in error, and copy of the appeal bond, constitute the return of the said writ of error.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the Court House of the Supreme Court for the First Judicial Department in the County of New York and have hereunto set my hand this 7th day of February, A. D. 1917.

[Seal Supreme Court, Appellate Division, First Department.]

ALFRED WAGSTAFF, *Clerk.*

68 PLAINTIFF'S EXHIBIT NO. 1.

Interstate Commerce Commission.

WASHINGTON, March 28, 1916.

The Commission approved and adopted the following Conference Ruling:

Upon inquiry as to whether or not under the provision of Section 1, "That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services," a railroad may contract with telegraph company (including in that term "telephone, telegraph and cable companies"), to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under Section 6 of the Act, Held, That while said carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accord-

ance with the provisions of Section 6 of the Act, and of the reasonable charges of said telegraph company, regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier.

P. Ex. 1. June 21, '16.

69 PLAINTIFF'S EXHIBIT NO. 2.

In the Matter of Railroad-Telegraph Companies.

Petition of the Western Union and Postal Telegraph Companies.

Decided December 21, 1906.

As a telegraph service along its right of way is essential to the safe operation of its trains, a railroad company or a group of separately incorporated roads generally recognized as a "railway system," may lawfully contract to furnish free or reduced-rate transportation to a telegraph company for such of its officers, men, materials, and supplies as are required in connection with the construction, maintenance, and operation of such a telegraph line and service upon its own right of way; and the legality of such free or reduced-rate transportation is not affected by the fact that the telegraph company may also use such telegraph lines in connection with its telegraph service to the public.

But such a railroad company or system of roads cannot lawfully contract in consideration of free telegraph service or service at reduced rates over wires beyond its own right of way to furnish free or reduced-rate transportation for the officials, employees, laborers, materials or supplies of a telegraph company in connection with the construction, maintenance, or operation of a telegraph line and service off the line of such railroad company or system of railroads and upon the line or lines of another carrier or system.

Previous rulings of the Commission in relation to "Pay-
70 ment for transportation" and "Issuance and use of free passes," so far as they may affect or control railroad-telegraph contracts, explained and reaffirmed.

Report and Opinion of the Commission.

By the COMMISSION:

On September 15, 1906, the Commission formally announced in a general tariff circular the following administrative ruling:

Payment for transportation.—Nothing but money can be lawfully received or accepted in payment for transportation subject to the act

whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates in effect at the time precludes the acceptance of services, property, or other payment, in lieu of the amount of money specified in the published schedules.

On October 12th, 1906, the Commission announced an administrative ruling as follows:

Issuance and use of free passes.—The provisions of the act relative to the issuance of free tickets, free passes, free transportation, or free carriage to employees of carriers apply only to persons who are actually in the service of the carriers and who devote substantially all their time to the work or business of such carriers. Land and immigration agents, unless they are bona fide and actual employees, representatives of correspondence schools, agents of accident or life insurance companies, agents of oil or lubricating companies, etc., are not within the classes to which free or reduced-rate transportation can be lawfully furnished.

But the Commission does not construe the law as preventing a carrier from giving necessary free transportation to a person traveling over its line solely for the purpose of attending to the business of, or performing a duty imposed upon the carrier, nor from giving free carriage over its line to the household and personal effects of an employee who is required to remove from one place to another at the instance of, or in the interests of, a carrier by which he is employed.

Nor does the Commission construe the law as preventing a carrier from giving free or reduced-rate carriage over its line to contractors for material, supplies, and men for use in construction, improvement, or renewal work on the line of that carrier, provided such ar-
71 rangements for free or reduced-rate carriage are made a part of the specifications upon which the contract is based and of the contract itself.

In making the above ruling of October 12 the Commission intended to be understood as holding that the provisions of law permitting carriers to accord free or reduced-rate transportation under certain conditions and for certain purposes, apply, inter alia, to materials, supplies, and men required under contracts between railroad and telegraph companies for the construction, maintenance, and operation of telegraph lines upon and along the rights of way of such railroad companies and for use in connection with the operation of their own lines; and as implying also that, inasmuch as a telegraph service along their own right of way is a necessary part of their equipment and is essential to the safe operation of trains by railroad companies, the legality of such free or reduced-rate transportation so accorded by the carriers to such telegraph companies is not affected by the fact that telegraph companies are frequently permitted by the carriers to use the telegraph lines so erected along their own right of way, in the performance by such companies of a telegraph service for the public.

On November 9 the Commission heard the arguments of counsel for the Western Union and Postal Telegraph Companies in support

of their petition, filed with the Commission, for a modification of the above rulings so far as they might control or govern certain contracts theretofore entered into between the petitioning telegraph companies and certain railroad companies, under which, in consideration of the free telegraph service accorded by the petitioners over wires of the lines of the respective contracting railroad companies, the
72 latter agree to furnish free or reduced-rate transportation to such telegraph companies for the men, materials and supplies necessary in connection with the construction, operation, and maintenance of such telegraph lines off the lines of the respective contracting carriers, and upon the rights of way of other carriers. Counsel for several railroad companies were also heard in support of the petition of the telegraph companies.

After a careful consideration of the oral arguments of counsel and of the printed and typewritten briefs submitted to us in support of these petitions, the Commission is of the opinion that the rulings above set forth are in exact conformity with the terms and spirit of the law. Contracts between telegraph companies and carriers for the maintenance of telegraph lines on the rights of way of railroads are sui generis and unlike any other contracts with carriers that have come to our attention. So far as we can now see, the full performance of such contracts by the carriers with whom they are made would not affect any public or private interests adversely. Nevertheless, the Commission knows of no provision or law now in force that vests it with any authority or any clause in the law that affords it a reasonable ground to differentiate "off the line" service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers. The mere fact that carriers, as a means of securing traffic, make agreements with shippers, tracing the freight cars on the rails of other carriers, communicating with their agents in distant localities, etc., etc., frequently find it convenient to telegraph to points beyond their own right of way and are allowed by the telegraph companies to do so free
73 or at reduced telegraph rates, does not make it lawful for a railroad company to grant to a telegraph company free or reduced-rate carriage for its officers, men, materials, or supplies destined for use in the telegraph service on the right of way of other carriers.

The Commission is of the opinion that such contracts with telegraph companies may lawfully be entered into by a railroad or by a group of separately incorporated roads generally recognized as a "railway system"; and that, in consideration of the construction, maintenance, and operation of a telegraph line upon the right of way of such road or system of roads, which telegraph line such road or system would otherwise be compelled as an operating necessity to construct and maintain for itself, a carrier may accord to such telegraph company free or reduced-rate transportation for such officers, men, materials, and supplies of such telegraph company as are required and necessary in connection with the construction, maintenance, and operation of such telegraph lines upon such carrier's own right of way or the right of way of such system of roads.

But the Commission is of the opinion that so much of any such contract between a telegraph company and a carrier as stipulates or contemplates that such carrier will furnish free or reduced-rate carriage and transportation to the officials, employees, laborers, materials, or supplies of such telegraph company, in connection with the construction, maintenance and operation of a telegraph line and service off the lines of such carrier and on the lines or system of lines of any other carrier, and for the use and service of such other carrier or for such telegraph company, is unlawful under
74 the terms of the act to regulate commerce. In our opinion no railroad or system of railroads can lawfully stipulate or contract with a telegraph company for the carriage of its officials, employees, or property for any greater or less or different consideration than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of a telegraph service on its own lines or system of lines.

Except as the rulings of the Commission are herein explained and applied, the petition of the telegraph companies is denied.

[Endorsed:] P. Ex. 2. June 21, '16.

75 PLAINTIFF'S EXHIBIT NO. 3.

Transportation of Men or Property for Telegraph Companies (issued June 3, 1907). In its decision on the petition of the Western Union and Postal Telegraph Companies, issued December 27, 1906, the Commission held it would be unlawful for a carrier subject to the act to contract or stipulate with a telegraph company for the carriage of its officials, employees, or property for any greater or less or different compensation than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of telegraph line and service on its own line. It was held that a group of separately incorporated roads, recognized as a "railway system," may be considered as one in the making of contracts for telegraph service on that system.

This definitely differentiates between the employees of the telegraph company who are actually engaged in constructing and maintaining a telegraph line along the line of a railway, or in operating such telegraph line as a part of the actual operation of that railway, and those who are engaged in the commercial business of the telegraph company. The fact that railway officials may, by use of D. H. franks, send messages on railway business from or receive such messages at a commercial office of a telegraph company does not constitute that office a part of the operating of any of the lines of railway which such officials represent, nor bring that telegraph office into such relationship with the business of the railways as to warrant treating it as a part of the operating facilities of such railways. Practically all telegraphing so done is 'off the line' business and is to be considered as commercial business. The same dis-

tinction is to be observed in the hauling of materials and
76 supplies for telegraph companies with which the railway company has contract for telegraphic service.

77 PLAINTIFF'S EXHIBIT No. 4.

Ruling of Interstate Commerce Commission of June 30th, 1908.

Notice as to the Issuance of Passes. It appearing that the ruling issued by the Commission on the 9th day of June, A. D. 1908, relative to the issuance and use of passes, should be modified in certain respects relating to the forms of passes to persons eligible to receive free transportation under the act to regulate commerce, it is ordered that said ruling shall be amended to read as follows:

Many abuses in the issuance and uses of passes have been discovered by the Commission which it is desired to correct, and to this end, and because of the misinterpretation of the law by carriers generally, the Commission at this time makes announcement that it will recommend the indictment and prosecution of all carriers and persons issuing passes to, or allowing the use of passes by, any persons not included within the designated classes to whom free transporation may be given by carriers subject to the act to regulate commerce as set forth in said act. Among those not included under the provisions referred to are the following:

1. Officers or employees of news companies other than newsboys.

2. Officers or employees of telegraph or telephone companies, excepting when personally engaged in operation, extension, repair or inspection of lines upon or along the railroad right of way and used in connection with the operation of the railroad. * * *.

[Endorsed:] P. Ex. 4. June 21, '16.

78 PLAINTIFF'S EXHIBIT No. 5.

P. Ex. 12. June 8/16.

28934.

JOHN A. HUMBIRD et al.

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY.

79 Pleas in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, in Chancery, Sitting at the United States Court-room, in the City of Chicago, in said District and Division, Before the Hon. Christian C. Kohlsaat, Circuit Judge of the United States for the Seventh Judicial Circuit, on Wednesday, the Fourth Day of May, 1910, Being One of the Days of the December Term of said Court, Begun Monday,

the Twentieth Day Thereof, in the Year of Our Lord One Thousand Nine Hundred and Nine, and of the Independence of the United States of America the One Hundred and Thirty-fourth year.

Present: Hon. Christian C. Kohlsaat, Circuit Judge, presiding; Luman T. Hoy, United States Marshal for said District, and H. S. Stoddard, Clerk of said Court.

80 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

28934.

JOHN A. HUMBIRD, GEORGE T. MEYER, WALTER CUNLIFFE, ALEXANDER F. WALLACE, EDWIN WATERHOUSE, and EDWARD P. TENNANT

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY.

Be it remembered, that heretofore to-wit: on the twenty-third day of January, 1908, in the record of proceedings thereof in the above entitled cause, appears before the Honorable Christian C. Kohlsaat, Circuit Judge, the following entry to-wit:

28934.

JOHN A. HUMBIRD, GEORGE T. MEYER, WALTER CUNLIFFE, ALEXANDER F. WALLACE, EDWIN WATERHOUSE, and EDWARD P. TENNANT

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY.

Ordered, that Albert R. Moore, of St. Paul, Minnesota, be and he is hereby appointed Special Master in Chancery, in this cause, to whom shall be referred, as of course, all matters arising in the progress of this cause, which by the rules and practice of this Court, or by the general or special orders of the Court, are required or proper to be referred to a Master in Chancery; said Albert R. Moore, being the Special Master heretofore appointed in that certain cause pending in the Circuit Court of the United States for the District of Minnesota, the Court of primary jurisdiction in said cause, wherein John A. Humbird, et al., are plaintiffs, and Chicago Great Western Railway Company is defendant, and in which said
81 cause Alpheus B. Stickney and Chas. H. F. Smith, the Receivers herein, were originally appointed Receivers.

The Special Master is hereby authorized to establish and maintain his office at the city of St. Paul, in the state of Minnesota, the headquarters of the said Receivers appointed in this cause, their principal

accounting and operating offices as such receivers being situated at said city of St. Paul, in the state aforesaid, and may, in his discretion, hold a Master's Court at any point in this district he may designate, whenever he is satisfied that costs and expenses may be saved to the estate, or the convenience of the parties promoted by so doing, and shall hold court in this district whenever any witnesses residing in this district are to be examined & so desire.

Whenever the receivers in this cause shall file their reports in the office of the Master in this cause, such Master, with the assistance of one or more competent accountants, whom he is authorized to select and employ, will proceed to examine said reports. For the purpose of making said examination the Master, when he deems it necessary may summon the receivers and any of their employes, and any other persons before him, and examine them under oath touching any and all matters involved in said reports.

The Master, by himself and his accountants, is authorized to visit the office or offices of said receivers, and their accounting offices, wherever kept, and as often as necessary, to examine all books, vouchers, papers and correspondence *with* in his opinion may
82 be necessary for a full and accurate understanding of the reports of said receivers, and said Master is authorized to demand from said receivers and their clerks, agents and accountants, copies of all vouchers, papers and books which he may deem necessary to a full and complete examination of the reports of said receivers.

The Master will proceed with all convenient dispatch in the examination of said reports, and as soon as his examination of any report is completed, will prepare and file his report thereon, together with the report of the receivers, in the office of the clerk of this court.

The Receivers shall make and file their reports in the Special Master's office at St. Paul, Minnesota, and shall include therein all matters of administration in the jurisdiction of other Courts.

83 And afterwards to-wit: on the twentieth day of May, 1909, came the Postal Telegraph-Cable Company, by its solicitors and filed in the Clerk's office of said Court in said entitled cause its certain Intervening Petition in words and figures following to-wit:

84 *Intervening Petition of Postal Telegraph-Cable Company.*

UNITED STATES OF AMERICA,
Northern District of Illinois,
Eastern Division:

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity.

JOHN A. HUMBIRD et al., Complainants,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY, Defendant.

To the Honorable Christian C. Kohlsaat, Judge of said Court, in Chancery Sitting:

Your Petitioner, the Postal Telegraph-Cable Company, a corporation organized under the laws of the State of New York, complains of Charles H. F. Smith and Horace G. Burt, receivers of the Chicago Great Western Railway, and alleges as follows:

1. That your Petitioner, the Postal Telegraph-Cable Company, is a corporation organized under the laws of the state of New York, having power and authority under its articles of incorporation to own, construct, use and maintain lines of electric telegraph within and also beyond the limits of the State of New York and that the lines of telegraph owned and controlled and maintained by your Petitioner extend unto and through the several states of the Union and connect with ocean telegraph cables at the Atlantic and Pacific seaboards.

2. That the Chicago Great Western Railway Company is a corporation of the States of Illinois, Iowa and Minnesota and that it is the successor in law to the Chicago, St. Paul and Kansas City
85 Railway Company, a corporation of the state of Iowa, and the lessee of the Mason City and Fort Dodge Railway Company, also a corporation of the State of Iowa.

3. That on the twenty-first day of December, 1888, an agreement was entered into by and between the Chicago, St. Paul and Kansas City Railway Company and your Petitioner, a copy of which agreement is hereto attached as "Exhibit A" and made a part of this petition to the same extent as though it had here been inserted in full.

4. That said contract recites that said Railway Company owns and operates a railway extending from the City of Chicago to Minneapolis, via Dubuque, Oelwein and St. Paul and from Oelwein via Marshalltown and Des Moines, Iowa to St. Joseph, Missouri, with various branches as in said agreement set forth, and that said Railway Company owns and operates a line of telegraph consisting of

poles and two wires covering nearly the whole of said route and that the said Telegraph Company owns and operates lines of telegraph reaching the principal cities of the United States North of and including St. Louis, Cincinnati, and Washington City, and East of the Missouri River and, by its connections the principal cities and towns in British America and on the Pacific Coast, and, via the Commercial Cable Company all points in the Old World, and was engaged in extending its lines into the Southern states.

5. That said agreement further recites that the Telegraph Company should take charges of the telegraph lines and property of the Railway Company on the first day of January, 1889, and it grants and assures the Telegraph Company the exclusive right of way on and along the line, lands and branches of said Railway Company and on any extensions and branches thereof, for the construction and use of lines of poles and wires, with the right to put up and construct from time to time such additional wires, or such ad-
86 ditional lines of poles as the Telegraph Company may find necessary for its business. The Railway Company further agrees to furnish all labor necessary for the maintenance, repair and renewals of said telegraph lines and for any extensions thereto that may thereafter be made upon the property that was then or might thereafter be owned or controlled by the Railway Company and to furnish office rooms in its railway stations.

6. That it was further provided under section three of said agreement, that the Railway Company should transport, free of charge over its railway, upon the application of the Superintendent or other officer of the Telegraph Company, employees of the Telegraph Company, when travelling upon the business of said Company, and also to transport and distribute free of charge along the line of its railway, all poles and other material or supplies for the construction, maintenance, renewal, repair and operation of the lines and wires covered by said agreement, and of such additional lines of poles and wires as might be erected under the provisions of said agreement, and also of material and supplies for the establishment, maintenance and operation of the offices of both parties to said agreement at places along and adjacent to said Railway.

7. That the said Telegraph Company further agreed to take possession of the telegraph property of the Railway Company on the first day of January, 1889, and thereafter to furnish all materials necessary for the maintenance and repair of said lines and of any extensions thereof that might thereafter be made, and all battery, instruments and apparatus necessary for operating the same, together with blank forms and stationery necessary for the transaction of a commercial telegraph business at all points along the line of said railway at which a telegraph office was then or might thereafter be maintained;

87 8. That the Telegraph Company further agreed to pay to the Railway Company the sum of eighty-seven thousand dollars ($87,000.00) in three equal payments of twenty-nine thousand dollars ($29,000.00) on July 1st, 1889 and on January 1st and July 1st, 1890;

9. That the Telegraph Company further agreed to transmit free over its lines beyond said railway telegraph lines, business of the Railway Company to the extent of ten dollars ($10.00) (subsequently, under contract dated November fifth, 1902, between said Chicago Great Western Railway and your Petitioner changed to twelve dollars ($12.00) per mile of railway per annum, including any extensions that might thereafter be made of said Railway, said business being charged at the regular rates of the Telegraph Company, and for such purpose the Telegraph Company would issue to such officers of the Railway Company as might be designated by the President, Vice President or General Manager thereof, annual franks of the Telegraph Company, authorizing such free transmission of messages relating strictly to the railway or corporate business of the Railway Company, originating at or destined to points on the Telegraph Company's line within the United States, either upon or off the line of said railway; and in case the telegraph business of said Railway beyond its lines should amount to more than twelve dollars ($12.00) per mile of railway per annum, the excess should be paid for at one-half the regular rates of the Telegraph Company. It was understood, however, that such telegraph service applied only to the transmission of messages concerning business of the Railway Company, and should not be extended to messages for transmission by Ocean Cable, nor to messages ordering sleeping car, parlor car, or steamer berths, or other accommodations for customers of the Railway Company;

88 10. That it was further provided that the business of the Railway Company should have precedence over all other business upon the wires set apart for the use of the Railway Company and that the Railway Company should have the full use of all the wires then in operation and of two wires upon any extensions of said Railway that might thereafter be made, in case the Railway Company required the same, free of charge;

11. That it was further provided that in case the Railway Company should require the use of an additional wire or wires for railway business, over and above the two wires hereinbefore mentioned, the same shall be paid for by the Railway Company and in case an additional wire or wires should be required for commercial business, the same shall be paid for by the Telegraph Company, and, in either case, such additional wire or wires should come in under the agreement as to maintenance, repairs and renewals. In case the two wires, or either of them, set apart for the use of the Railway Company, should at any time be unfit for use, the Railway Company should have the free use of such of the wires set apart for commercial business as might be necessary to transact its business until the wires set apart to it should be put in fit condition for use;

12. That it was further provided that the provisions of said agreement should be and continue in force for ninety-nine years from the date thereof.

13. Your Petitioner further shows that under agreement dated the twenty-sixth day of December, 1903, by and between the Mason City and Fort Dodge Railway Company and your Petitioner, a con-

tract substantially similar to said last mentioned contract was entered into between said Railway Company and your Petitioner; to continue in force, however, for eighty-four years from the date thereof, so as to expire at about the same time that the original contract between the Chicago Great Western Railway Company and Petitioner
89 expires, which contract is attached and made part hereof as Exhibit "B."

14. Your Petitioner alleges that both said Railway Companies and your Petitioner have each faithfully performed their respective duties and obligations undertaken by each of them under said several contracts until the filing of the Bill of Complaint herein and the appointment of the said Receivers by this Honorable Court to take charge of and manage said Chicago Great Western Railway;

15. That subsequently to the appointment of said Receivers, the said Receivers elected to abide by and perform said contracts with your Petitioner, and have ever since their appointment as said Receiver-, adhered to and complied with the terms of said contracts, so far as the Chicago Great Western Railway was bound to comply with and perform said contracts and your Petitioner has likewise rendered the same services and duties to the Receivers that it was under said contract bound to render to and perform for the said Railway Company prior to the appointment of said Receivers and that, by such action, the Receivers have ratified and confirmed said contracts with your Petitioner and the same are now in full force and effect and binding upon said Receivers.

16. Your Petitioner further shows that, under Section Three (3) of said agreement of December 26, 1888, it is the duty of said Railway Company to transport free of charge over its railway, upon application of the Superintendent or other officer of the Telegraph Company, employees of the Telegraph Company when travelling upon the business of said Telegraph Company;

17. That by reason of a great sleet storm in the territory East of the City of Chicago, late in the month of February, 1909, a considerable portion of your Petitioner's telegraph wires and poles *were* broken and communication was interrupted between the East and the West; that in such instances which have occurred each year in the past your Petitioner and the Western Union Telegraph Company and the telephone companies find it necessary to draft every
90 available lineman from territory not affected by atmospheric disturbances to the place or places where there is a general breaking down or destruction of the telegraph lines, in order to reconstruct and repair such lines in the shortest possible time; that the necessity for such reconstruction is always imperative and that the linemen and supervising officers are required to and do work almost continuously until such repairs and reconstruction have been effected and communication has been re-established, your Petitioner averring that it is not uncommon for men to work twenty-four and thirty-six hours continuously in such labors; that the said breaking of your Petitioner's wires and lines was so extensive that linemen were immediately drafted from the territory west of Chicago, including linemen from Minneapolis and St. Paul into the territory East of Chicago,

and that upon the completion of said labors and restoration and reconstruction of the telegraph lines, said linemen were returned to their home stations.

18. That four (4) such telegraph linemen after restoration of the lines, and on March 1, returned to the City of Chicago for the purpose of returning to their homes at Minneapolis and St. Paul, and your Petitioner, in accordance with the terms of the contract between it and said Receivers, applied to said Receivers for free transportation for said four (4) linemen from Chicago to St. Paul; that said free transportation could not be obtained from the headquarters of said Receivers at St. Paul, Minnesota, and to save the time of said four (4) men, your Petitioner purchased tickets for said four (4) linemen over said Receivers' Railway from Chicago to St. Paul and paid therefor the regular rate of fare of eight dollars ($8.00) each, or thirty-two dollars ($32.00) for the total fares.

19. That subsequently thereto, your Petitioner applied to the said Receivers for a refund of said thirty-two dollars ($32.00)
91 so paid out by your Petitioner for the fares of said linemen, upon the ground that your Petitioner was entitled to free transportation for said linemen under Section Three (3) of your Petitioner's contract aforesaid;

20. That in reply to your Petitioner's demand said Receivers declined to refund to your Petitioner said sum of thirty-two dollars ($32.00), alleging as a reason for such refusal that the men in question were engaged on your Petitioner's lines East of Chicago; that they had not gone to Chicago for the purpose of doing any work on the Great Western Railway right of way, nor were they returning to St. Paul for the purpose of doing any work upon said right of way, wherefore said Receivers refused to refund said fares; said Receivers justified their refusal to refund upon the ground that the Interstate Commerce Commission had ruled that free transportation under the Hepburn Act could not be given to telegraph employees notwithstanding the existence of a contract between a railway company and a telegraph company requiring the railway company to issue to the telegraph company free transportation to its employees under circumstances and facts similar to those hereinbefore stated by your Petitioner.

21. Your Petitioner alleges that the terms of the contract between your Petitioner and said Great Western Railway Company as adopted by said Receivers, as hereinbefore set forth, requires the Receivers to issue to your Petitioner free transportation for its linemen and employees, whether said linemen are to be employed upon the right of way or are upon a journey with that purpose in view, or are to be employed or have been employed upon your Petitioner's telegraph lines upon other railways or highways than said Chicago Great Western Railway's right of way and that said contract does not, by its terms and was intended in spirit, to limit said free transporta-
92 tion of employees to those only who were to render or were rendering service upon or in connection with the telegraph lines of your petitioner upon the said Chicago Great Western Railway.

22. Your Petitioner alleges that under Section one (1) of the Act approved June 29, 1906, known as the Hepburn Act and intended to prevent discrimination by common carriers, railway companies are expressly authorized to issue free transportation to linemen of telegraph and telephone companies, and either the spirit of said Act nor the express words thereof indicate any intention to limit the carriers' right to issue such free transportation solely to such telegraph and telephone linemen as shall be or shall have been engaged in rendering service to the telegraph or telephone company upon the line of the railway company granting such free transportation.

23. Your Petitioner upon advice of Counsel alleges that, even if its claim to such free transportation shall be held not to be within the exceptions set forth in said Hepburn Act, yet its claim to free transportation of its employees is, under its said contract, protected by the Constitution of the United States, notwithstanding the terms of said Hepburn Act, and that said Act cannot rightfully be so construed as to impair the obligation of said contract and to discharge the Railway Company and its Receivers from obligations and duties resting upon them to the injury, prejudice and great money loss annually of your Petitioner during the life of said contract.

24. Your Petitioner therefore insists that it is entitled to a refund of said sum of thirty-two dollars ($32.00) and it prays that an order may be entered requiring said Receivers to answer this petition upon a short day to be fixed by the Court and that a hearing may be had upon any question of fact which may be raised by this petition
93 and said answer, and that, upon a hearing thereof, said Receivers may be directed and ordered by this Honorable Court to refund to your Petitioner the said sum of thirty-wo dollars ($32.00) so as aforesaid paid by it to said Receivers for the transportation of its linemen from Chicago to St. Paul as aforesaid.

And your Petitioner will ever pray, etc.

POSTAL TELEGRAPH-CABLE CO.,
Petitioner.

By T. W. CARROLL, *General Superintendent.*

LOESCH, SCOFIELD & LOESCH,
Solicitors for Petitioner.
FRANK J. LOESCH,
Of Counsel.

STATE OF ILLINOIS,
County of Cook, ss:

T. W. Carroll, being first duly sworn, says that he is the General Manager of the Postal Telegraph-Cable Company, the petitioner in the foregoing petition; that he has read said petition and knows the contents thereof, and that the same is true.

T. W. CARROLL.

Subscribed and sworn to before me this 14th day of May, A. D. 1909.

[SEAL.]

ANNA W. PORTER,
Notary Public.

94 EXHIBIT A.

This agreement made and entered into this 26th day of December, 1888, by and between the Chicago, St. Paul and Kansas City Railway Company, a corporation organized under the laws of the State of Iowa, party of the first part, and the Postal Telegraph-Cable Company, a corporation organized under the laws of the State of New York, party of the second part, hereinafter designated as the Railway Company and the Telegraph Company respectively, witnesseth:

That whereas the Railway Company owns and operates a railway extending from the City of Chicago, Illinois, to Minneapolis, Minnesota, via Dubuque, Oelwein, Iowa, and St. Paul Minnesota, and from Oelwein via Marshalltown and Des Moines, Iowa, to St. Joseph, Missouri, with branches from Dubuque Junction to Lyle Minnesota, from Sumner to Hampton, and from Wilson Junction to Cedar Falls, Iowa, and contemplates extending its railway in the near future, by lease or otherwise, from St. Joseph to Kansas City, Mo., and whereas the railway Company owns and operates a line of telegraph consisting of poles and two wires covering nearly the whole route of said railway as above described, together with the necessary batteries, machinery, and apparatus necessary for operating the same:

And whereas the Telegraph Company owns and operates lines of telegraph reaching the principal cities in the United States north of and including St. Louis, Cincinnati, and Washington City, and east of the Missouri River, and by its connections, the principal cities and towns in British America and on the Pacific Coast, and via the Commercial Cable Company to points in the Old World that are reached by telegraph and is engaged in extending its lines into the Southern States and is desirous of including within its system the lines of telegraph of the said Railway Company.

Now therefore for and in consideration of the covenants and agreements herein contained, the parties hereto have mutually agreed as follows:—

95 1. The Railway Company agrees that the Telegraph Company may take charge of the telegraph lines and property of the Railway Company as hereinbefore described, on the first day of January, 1889, and that, so far as it legally may, it hereby grants and agrees to assure to the Telegraph Company the exclusive right of way on and along the line, lands and branches of the Railway Company, and on any extensions and branches thereof, for the construction and use of lines of poles and wires, and underground or other lines for commercial and public uses or business, with the right to put up and construct from time to time such additional wires, or such additional lines of poles as the Telegraph Company may find necessary for its business, and the Railway Company agrees to clear and keep clear said right of way of all trees, undergrowth and other obstructions to the construction and maintenance of the lines and wires provided for herein, and the Railway Company will not, unless legally bound so to do, transport men or materials for the construction or operation of a line of poles or wires

or underground, or other lines in competition with the lines of the Telegraph Company, party hereto, except at and for the Railway Company's regular local rates, nor will it furnish for any competing line any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at other than regular stations; provided always, that in protecting and defending the exclusive rights conveyed by this contract, the Telegraph Company may use and proceed in the name of the Railway Company, but shall indemnify and hold harmless the Railway Company from any and all damages, costs, charges and legal expenses incurred therein or thereby.

II. The Railway Company agrees to furnish all labor necessary for the maintenance, repairs and renewals of said telegraph lines, and for any extensions thereto that may hereafter be made upon property that is now or may hereafter be owned or controlled by the Railway Company, and to furnish office room in its rail-

96 way stations, and that its railway telegraph operators shall handle the business of the Telegraph Company at all stations along the line of said railway, except at such places as the Telegraph Company may establish a separate office for the better accommodation of the telegraph business of such places. It is understood and agreed, however, that whenever the commercial or public business at any office maintained by the Railway Company shall become greater than can be properly carried on by the operator or operators employed by the Railway Company, then the Telegraph Company shall furnish and pay for its own operating service at such office. And it is agreed that the employes of the Railway Company in the performance of their duties in connection with the maintenance and operation of said telegraph lines, shall observe the rules and regulations of the Telegraph Company applicable thereto, and shall exercise the same care and diligence in the maintenance and repair of the wire or wires that the Telegraph Company has or may have along said railway for its business, and in the transaction of the commercial telegraph business, as in the maintenance and repair of the wire or wires of the Railway Company, and in the transaction of the telegraph business of the Railway Company.

III. The Railway Company agrees to transport free of charge over its railway, upon application of the superintendent or other officer of the Telegraph Company, employes of the Telegraph Company, when travelling upon the business of said Company, and also to transport and distribute free of charge along the line of its railway all poles or other material and supplies for the construction, maintenance, renewal, repair and operation of the lines and wires covered by this agreement, and of such additional lines of poles and wires as may be erected under the provisions of this agreement, and also of material and supplies for the establishment, maintenance, and operation of the offices of both parties hereto at places along and adjacent to said railway.

97 IV. The Telegraph Company agrees to take possession of the telegraph property of the Railway Company on the first day of January, 1889, and thereafter to furnish all materials neces-

sary for the maintenance and repair of said lines, and of any extensions thereof that may be hereafter made, and all battery, instruments, and apparatus necessary for operating the same, together with all blank forms and stationery necessary for the transaction of a commercial telegraph business at all points along the line of said railway at which a telegraph office is now, or may hereafter be maintained.

V. The Telegraph Company agrees, if requested so to do by the Railway Company, to promptly construct a substantial telegraph line upon any extension of railway which the Railway Company may make, and to string thereon two wires, which shall be for the exclusive use of the Railway Company, if the business of the Railway Company requires it.

VI. The Telegraph Company agrees to pay to the Railway Company the sum of Eighty-seven thousand dollars ($87,000) in three equal payments of Twenty-nine thousand dollars, ($29,000) on the first of July, 1889, the first of January, and the first of July, 1890, respectively, for which sums it will give its promissory notes, with interest at the rate of five per cent per annum, upon the execution of this agreement.

VII. The Telegraph Company agrees to transmit free over its lines beyond said railway telegraph lines, business of the Railway Company to the extent of $10 per mile of railway per annum, including any extensions that may hereafter be made of said railway, such business being charged at the regular rates of the Telegraph Company, and for this purpose the Telegraph Company will issue to such officers of the Railway Company as may be designated by the President, Vice-President, or General Manager thereof, annual franks of the Telegraph Company, authorizing such free transmission of messages relating strictly to the railway or corporate business of
98 the Railway Company, originating at or destined to points on the Telegraph Company's line within the United States, either upon or off the line of said railway; and in case the telegraph business of the Railway Company beyond its lines shall amount to more than $10 per mile of railway per annum, the excess shall be paid for at one-half the regular rates of the Telegraph Company. It is understood and agreed, however, that the telegraph service herein provided for, applies only to the transmission of messages concerning business of the Railway Company, and shall not be extended to messages for transmission by Ocean Cable, nor to messages ordering sleeping car, parlor car, or steamer berths, or other accom-odations for customers of the Railway Company, the tolls upon which should properly be chargeable to such customers.

VIII. It is mutually understood and agreed that the business of the Railway Company shall have precedence over all other business upon the wires set apart for the use of the Railway Company, and that the Railway Company shall have the full use of all the wires now in operation, and of two wires upon any extensions of said railway that may hereafter be made in case the Railway Company require the same free of charge; but that until the Railway Company shall find it necessary to have the sole use of said wires, the commercial business

of the Telegraph Company shall also be done over the said wires. In case the Railway Company shall require the use of an additional wire or wires for railway business over and above the two wires hereinbefore mentioned, the same shall be paid for by the Railway Company, and in case an additional wire or wires shall be required for commercial business, the same shall be paid for by the Telegraph Company, and in either case, such additional wire or wires shall come in under the terms of this contract as to maintenance, repairs, and renewals. In case the two wires, or either of them, set apart for the use of the Railway Company, shall be at any time unfit for use the Railway Company shall have the free use of such of the wires
99 set apart for commercial business as shall be necessary to transact its business until the wires set apart to it shall be put in fit condition for use.

IX. It is mutually understood and agreed, that the Railway Company is not to be responsible for, and the Telegraph Company hereby agrees to save harmless the Railway Company, and indemnify it against any loss or damages that may arise from any neglect or failure in the transmission or delivery of messages for any person doing business with the Telegraph Company, and on account of any other public telegraph business, nor shall the Railway Company be liable to the Telegraph Company for any defalcation or embezzlement of moneys received for the Telegraph Company by the Railway Company's operators, when such operators are acting as agents of the Telegraph Company, nor for any loss, damage or liability of any kind arising from any injury to persons in the employ of, or property belonging to said Telegraph Company, while being carried free over said Railway; and the Telegraph Company shall not be responsible for, and the Railway Company agrees to indemnify and save harmless the Telegraph Company, against any loss or damages arising from or on account of any error, delay, or default in the transmission or delivery of any message sent for the Railway Company under this agreement.

X. It is mutually understood and agreed that the Railway Company shall have the right to establish telegraph stations at such places along the line of said railway as it may deem necessary, and at all such stations the Telegraph Company agrees to supply instruments, local batteries, and blank forms and stationery for local business, as hereinbefore provided.

XI. It is mutually understood and agreed that the Railway Company shall have the right to the free use of any patent right, or any new discoveries or inventions that the Telegraph Company now owns or may hereafter own or use in its telegraph business, so far
100 as the same may be necessary and convenient for carrying on the telegraph business of the said lines of the said Railway Company.

XII. The provisions of this agreement, shall be and continue in force for ninety-nine years from the date hereof, and in case of any disagreement concerning the true intent and meaning of any of the provisions of this contract, the subject of such difference shall be referred to three arbitrators; one to be chosen by each of the parties

hereto, and the third by the two thus chosen, and the decision of such arbitrators, or a majority thereof, shall be final and conclusive.

In witness whereof the parties hereto have caused the names of their respective Presidents to be hereto subscribed and their corporate seals to be attested, the day and year first above written.

CHICAGO, ST. PAUL & KANSAS CITY RAILWAY COMPANY,
By A. B. STICKNEY, *President.*

Attest:
JOHN I. THOMPSON,
Assistant Secretary.

POSTAL TELEGRAPH-CABLE COMPANY,
By A. B. CHANDLER, *President.*

Attest:
J. O. STEVENS,
Ass't Secretary.

101 Memorandum of Agreement, made this fifth day of February, 1902, by and between the Chicago Great Western Railway, a corporation duly organized and existing under the laws of the State of — and the Postal Telegraph-Cable Company, a corporation duly organized and existing under the laws of the State of New York:

It is mutually agreed that the seventh clause (VII) of the agreement made and entered into December 26th, 1888, by and between the Chicago, St. Paul and Kansas City Railway Company, a corporation organized under the laws of the State of Iowa, and the said Postal Telegraph-Cable Company (the Chicago Great Western Railway Company as successor of the Chicago, St. Paul and Kansas City Railway Company having assumed said agreement), shall be and the same hereby is cancelled and the following clause substituted therefor, in effect from this date:

VII. The Telegraph Company agrees to transmit free over its lines beyond said railway telegraph lines, business of the Railway Company to the extent of twelve dollars ($12) per mile of railway per annum, including any extensions that may hereafter be made of said railway, such business being charged at the regular day rates of the Telegraph Company from the point where any such message originates, to the final destination, all such railway messages in the Telegraph Company's possession to be regarded as handled by them from point of origin to destination, and for this purpose the Telegraph Company will issue to such officers of the Railway Company as may be designated by the President, Vice President, or General Manager thereof, annual franks of the Telegraph Company, authorizing such free transmission of messages relating strictly to the railway or corporate business of the Railway Company originating at or destined to points on the Telegraph Company's line, within the United States, either upon or off the line of said railway; and in case

the telegraph business of the Railway Company beyond its lines shall amount to more than twelve dollars ($12) per mile of railway per annum, the excess shall be paid for at one half the regular rates of the Telegraph Company. It is understood and agreed, however, that the telegraph service herein provided for applies only to the transmission of messages concerning business of the Railway Company, and shall not be extended to messages for transmission by ocean cable, nor to messages ordering sleeping car, parlor car, or steamer berths, or other accom-odations for customers of the Railway Company, the tolls upon which should properly be chargeable to such customers.

In witness whereof the parties hereto have caused these presents to be signed and their corporate seals to be hereunto affixed and attested by their respective officers, duly authorized so to do, the day and year first above written.

[CORPORATE SEAL. T. L.]

CHICAGO GREAT WESTERN RAILWAY,
By SAM STICKNEY, *Gen. Manager.*

Attest:
R. C. WIGHT, *Sec'y.*

POSTAL TELEGRAPH-CABLE COMPANY,
By W. H. BAKER, *Vice-President.*

Attest:
CHAS. P. BRUCH,
Ass't Secretary.

102 (Copy.)

EXHIBIT B.

This agreement, made and entered into this 26th day of December, 1903, by and between the Mason City & Fort Dodge Railway Company, a corporation organized under the laws of Iowa, party of the first part, and the Postal Telegraph-Cable Company, a corporation organized under the laws of the State of New York, party of the second part, hereinafter designated as the Railway Company and the Telegraph Company respectively, witnesseth:

That whereas, The Railway Company owns and operates a railway extending from the City of Oelwein, Iowa, to Waverly, Iowa, and

Whereas, The Railway Company is desirous of obtaining the use of a line of telegraph covering the whole route of said railway as above described together with the batteries, machinery and apparatus necessary for operating the same and to that end permitted the Telegraph Company to enter upon the premises of the Railway Company for the purpose of constructing said line of telegraph which has been already partially constructed,

Now therefore, for and in consideration of the covenants and agreements herein contained the parties hereto have mutually agreed as follows:

1. The Railway Company agrees that the Telegraph Company

may construct so far as the same is not already constructed, a telegraph line upon the property of the Railway Company as hereinbefore described to be completed ready for use on the first day of January, 1904, and that so far as it legally may it hereby grants and agrees to assure to the Telegraph Company the exclusive right of way on and along the line and lands of the Railway hereinbefore described, and on any extensions and branches thereof for the construction and use of lines of poles and wires, and underground or other lines for Commercial and Public uses or business, with the right to put up and construct from time to time such additional
103 wires, or such additional lines of poles as the Telegraph Company may find necessary for its business, and the Railway Company agrees to clear and keep clear said right of way of all trees, undergrowth and other obstructions to the construction and maintenance of the lines and wires provided for herein, and the Railway Company will not, unless legally bound to do so transport men or materials for the construction or operation of a line of poles or wires or underground, or other lines in competition with the lines of the Telegraph Company party hereto, except at and for the Railway Company's regular local rates, nor will it furnish for any competing line any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at other than regular stations; provided, always that in protecting and defending the exclusive rights conveyed by this contract, the Telegraph Company may use and proceed in the name of the Railway Company, but shall indemnify and hold harmless the Railway Company from any and all damages, costs, charges and legal expense incurred therein or thereby.

II. The Railway Company agrees to furnish all labor necessary for the maintenance, repairs and renewals of said telegraph lines, and for any extensions thereto that may hereafter be made upon property that is now or may be hereafter owned or controlled by the Railway Company, and to furnish office room in its railway stations, and that its railway telegraph operators shall handle the business of the Telegraph Company at all stations along the line of said railway, except at such places as the Telegraph Company may establish a separate office for the better accommodation of the telegraph business of such places. It is understood and agreed however, that whenever the commercial or public business at any office maintained by the Railway Company shall become greater than can be properly carried on by the operator or operators employed by the Railway Company, then the Telegraph Company shall furnish and pay for its own operating service at such office. And it is agreed that
104 the employes of the Railway Company in the performance of their duties in connection with the maintenance and operation of said telegraph lines, shall observe the rules and regulations of the Telegraph Company applicable thereto, and shall exercise the same care and diligence in the maintenance and repair of the wire or wires that the Telegraph Company has or may have along said railway for its business, and in the transaction of the commercial telegraph business, as in the maintenance and repair of the wire or wires

of the Railway Company, and in the transaction of the telegraph business of the Railway Company.

III. The Railway Company agrees to transport free of charge over its railway, upon application of the Superintendent or other officer of the Telegraph Company, employes of the Telegraph Company when travelling upon the business of said Company, and also to transport and distribute free of charge along the line of its railway as above described all poles or other material and supplies for the construction, maintenance, renewal, repair and operation of the lines and wires covered by this agreement, and of such additional lines of poles and wires as may be erected under the provisions of the agreement, and also of material and supplies for the establishment, maintenance and operation of the offices of both parties hereto at places along and adjacent to said railway.

IV. The Telegraph Company agrees to construct so far as the same is not already constructed a substantial telegraph line, with at least two wires, which shall be for the exclusive use of the Railway company if the business of the Railway Company requires it, and complete it ready for use upon and along the property of the Railway Company on or before the first day of January, 1904, and thereafter to furnish all materials necessary for the maintenance and repair of said line, and of any extensions thereof that may be hereafter made, and all battery, instruments, and apparatus necessary for operating the same, together with all blank forms and stationery necessary for the transaction of a commercial telegraph business at all points along the line of said railway at which a telegraph office is now or may hereafter be maintained.

V. The Telegraph Company agrees, if requested so to do by the Railway Company, to promptly construct a substantial telegraph line upon any extension of railway which the Railway Company may make, and to string thereon two wires, which shall be for the exclusive use of the Railway Company, if the business of the Railway Company requires it.

VI. The Telegraph Company agrees during the continuance of this contract to transmit free over its lines beyond said railway telegraph lines, business of the Railway Company (and of the Chicago Great Western Railway Company so long as the said Chicago Great Western Railway Company operates and controls the said line of railway along which said telegraph line is to be completed as aforesaid) to the extent of twelve ($12.00) Dollars per annum per mile of railway as above described, including any extensions that may hereafter be made and brought under the operation of this contract, such business being charged at the regular day rates of the Telegraph Company from the point where any such message originates to the final destination, all such Railway messages in the Telegraph Company's possession to be regarded as handled by them from point of origin to destination, and for this purpose the Telegraph Company will issue to such officers of the Railway Company, or of the Chicago Great Western Railway Company, as may be designated by the President, Vice-President, or General Manager thereof, annual franks of the Telegraph Company, authorizing such transmission of messages

relating strictly to the railway or corporate business of the Railway Company, originating at or destined to points on the Telegraph Company's line within the United States, either upon or off the lines of said railway; and in case the telegraph business of the Railway Company (or of the Chicago Great Western Railway Company as aforesaid) beyond its lines shall amount to more than twelve
106 ($12.00) (*$12.00*) Dollars per mile of railway per annum the excess shall be paid for at one-half the regular rates of the Telegraph Company. It is understood and agreed however, that the Telegraph Service herein provided for is to be in addition to like service to which either company may be entitled to under other contracts with the Telegraph Company and it applies only to the transmission of messages concerning business of the Railway Company, and shall not be extended to messages for transmission by Ocean Cable, nor to messages ordering sleeping car, parlor car or steamer berths or other accommodations for customers of the Railway Company, the tolls upon which should properly be chargeable to such customers.

VII. It is mutually understood and agreed that the business of the Railway Company shall have precedence over all other business upon the wires set apart for the use of the Railway Company, and that the Railway Company shall have the full use of two wires upon all the railway covered by this agreement and any extensions thereof in case the Railway Company require- the same, free of charge; but that until the Railway Company shall find it necessary to have the sole use of said wires the commercial business of the Telegraph Company shall also be done over the said wires. In case the Railway Company shall require the use of an additional wire or wires for railway business over and above the two wires hereinbefore mentioned the same shall be paid for by the Railway Company and in case an additional wire or wires shall be required for commercial business, the same shall be paid for by the Telegraph Company, and in either case, such additional wire or wires shall come under the terms of this contract as to maintenance, repairs and renewals. In case the two wires or either of them, set apart for the use of the Railway Company shall be at any time unfit for use the Railway Company shall have free use of such of the wires set apart for commercial business as shall be necessary to transact its business until the wires set apart to it shall be put in fit condition for use.

VIII. It is mutually understood and agreed that the Rail-
107 way Company is not to be responsible for, and the Telegraph Company hereby agrees to save harmless the Railway Company, and indemnify it against any loss or damage that may arise from any neglect or failure in the transmission or delivery of messages for any person doing business with the Telegraph Company, and on account of any other public telegraph business, nor shall the Railway Company be liable to the Telegraph Company for any defalcation or embezzlement of moneys received for the Telegraph Company by the Railway Company's operators, when such operators are acting as agents of the Telegraph Company;

nor for any loss, damage or liability of any kind arising from any injury to persons in the employ of, or property belonging to said Telegraph Company, while being carried free over said railway, and the Telegraph Company shall not be responsible for, and the Railway Company agrees to indemnify and save harmless the Telegraph Company, against any loss or damages arising from, or on account of any error, delay or default in the transmission or delivery of any messages sent for the Railway Company under this agreement.

IX. It is mutually understood and agreed that the Railway Company shall have the right to establish telegraph stations at such places along the line of said railway as it may deem necessary, and at all such stations the Telegraph Company agrees to supply instruments local batteries and blank forms and stationery for local business as hereinbefore provided.

X. It is mutually understood and agreed that the Railway Company shall have the right to the free use of any patent right, or any new discoveries or inventions that the Telegraph Company now owns or may hereafter own or use in its telegraph business, so far as the same may be necessary and convenient for carrying on the telegraph business of the said lines of the said Railway Company.

XI. The provisions of this agreement shall be and continue in force for eighty-four (84) years from the date hereof, and in
108 case of any disagreement concerning the true intent and meaning of any of the provisions of this contract, the subject of such difference shall be referred to three arbitrators; one to be chosen by each of the parties hereto, and the third by the two chosen, and the decision of such arbitrators, or a majority thereof, shall be final and conclusive.

In witness whereof, the parties hereto have caused the names of their respective presidents to be hereto subscribed and their corporate seals to be attested the day and year first above written.

MASON CITY & FORT DODGE RAILWAY COMPANY,
By R. C. WIGHT, *Vice-President.*

Attest:
CHAS. A. TALMAN,
Ass't Secretary.

Form approved:
A. G. BRIGGS,
General Attorney.

POSTAL TELEGRAPH-CABLE COMPANY,
By W. H. BAKER, *Vice-Pres. & Gen'l Mgr.*

Attest:
CHAS. P. BRUCH,
Ass't Secretary.

Approved for execution:

——— ———,
General Manager.

(Endorsed:) Filed May 20, 1909. H. S. Stoddard, Clerk.

109 And afterwards to-wit: on the eig-th day of June, 1909, came the receivers in said entitled cause by their solicitors, and filed in the clerk's office of said court, their certain demurrer to the intervening petition of the Postal Telegraph-Cable Company. Said demurrer is in words and figures following to-wit:

Demurrer.

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity.

JOHN A. HUMBIRD et al., Complainants,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY, Defendant.

Demurrer of Charles H. F. Smith and Horace G. Burt, to Petition of Intervention of Postal Telegraph Company.

To the Honorable Judges of said Court, in Chancery Sitting:

Charles H. F. Smith and Horace G. Burt, as Receivers of the Chicago Great Western Railway, by protestation, not confessing or acknowledging all or any of the matters or things in the petition of intervention of the Postal Telegraph Cable Company contained to be true, in such manner and form as the same are therein set forth and alleged demur to said bill, and for cause of demurrer show:

110 1. That said petitioner, Postal Telegraph Cable Company, in and by said petition made or stated any such cause as doth or ought to entitle it to any such relief as is thereby sought and prayed for, and that it appears by the said petitioner's own showing by said petition, that it is not entitled to such relief.

2. That said petition of the said petitioner, the Postal Telegraph Cable Company, is wholly without equity.

3. That it doth appear from said petition of intervention that petitioner seeks only to recover certain sums paid by it to these receivers for the transportation of certain employes of petitioner over the line of railway operated by these receivers, which said sums petitioner was legally bound to pay, and which these receivers might not legally refund to petitioner.

Wherefore, and for divers other good causes of demurrer appearing in said petition, said receivers demur thereto and pray judgment of this Honorable Court, whether they should be compelled to make further or any answer to said bill, and they pray

further to be hence dismissed with their reasonable costs in their behalf sustained.

GARDNER, STERN & ANDERSON AND
H. LOOMIS,
Solicitors for Receivers.

A. G. BRIGGS,
Of Counsel.

I hereby certify that the foregoing demurrer is, in my opinion well founded in point of law.

Dated this 7th day of June, 1909.

A. G. BRIGGS,
Of Counsel for Receivers.

111 STATE OF MINNESOTA,
County of Ramsey, ss:

Charles H. F. Smith makes solem oath and says that he is one of the receivers of the Chicago Great Western Railway Company, against whom judgment is sought to be obtained by the petition of intervention of the Postal Telegraph Company; that the foregoing demurrer is not interposed for the purpose of delay, and that the same is true in point of fact.

CHAS. H. F. SMITH.

Subscribed and sworn to before me this 7th day of June, 1909.

[SEAL.] G. F. PHILLEO,
Notary Public, Ramsey County, Minnesota.

My Commission expires Nov. 18, 1909.

(Endorsed:) Filed June 8, 1909. H. S. Stoddard, Clerk.

112 And afterwards to-wit: on the sixteenth day of March, 1910 came the Special Master and filed in the clerk's office of said Court his report on the Intervening Petition of the Postal Telegraph-Cable Company. Said report is in words and figures following to-wit:

113 In the Circuit Court of the United States, Northern District of Illinois, Eastern Division.

JOHN A. HUMBIRD et al., Complainants,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY, Defendant.

Notice is hereby given that I have drafted my report upon the intervening petition of the Postal Telegraph-Cable Company. A copy of said draft is hereto attached.

Notice is further given that I will hear any objections that you

may have to my said report as so drafted at the office of the Clerk of the Circuit Court of the United States, in the city of Chicago, Illinois, on the 16th day of March 1910, at 10 o'clock in the forenoon, and at the said place and time I will settle my said report and you are then and there required to file any exceptions which you may have to my said report as so settled. Under existing orders exceptions not so filed at said time will not be considered by the Court.

A. R. MOORE,
Special Master.

Dated, St. Paul, Minn., March 4th, 1910.

To Messrs. Loesch, Scofield & Loesch, Attorneys for the Postal Teleg.-Cable Co., Petitioner, The Temple, Chicago, Ill.

To Messrs. Winston, Payne, Strawn & Shaw, Attorneys for the Receivers and the C. G. W. R. R. Co., First Nat'l Bank Building, Chicago, Ill.

114 In the Circuit Court of the United States, Northern District of Illinois, Eastern Division.

JOHN A. HUMBIRD et al., Complainants,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY, Defendant.

To the Honorable Judges of the Circuit Court Above Named, in Chancery Sitting:

In re Intervening Petition of the Postal Telegraph-Cable Company.

The petition of the Postal Telegraph-Cable Company above referred to was filed in the office of the Clerk of the above entitled Court on the 20th day of May 1909, and was thereafter transmitted by said clerk to me for my consideration, pursuant to an order made and entered in the above proceedings by the terms of which all intervening petitions filed in this cause by which the intervener seeks to recover any money or any property from the Receivers, were referred to me for my investigation and report.

Thereafter and on or about the 8th day of June 1909, the Receivers filed their demurrer to said intervening petition and assigned as the grounds thereof—

1. That said petitioner, Postal Telegraph-Cable Company, in and by said petition has not made or stated any such cause as doth or ought to entitle it to any such relief as is thereby sought and prayed for, and that it appears by the said petitioner's own showing by said petition, that it is not entitled to such relief.

115 2. That said petition of the said petitioner, the Postal Telegraph-Cable Company, is wholly without equity.

3. That it doth appear from said petition of intervention that petitioner seeks only to recover certain sums paid by it to these Re-

ceivers for the transportation of certain employes of petitioner over the line of railway operated by these Receivers, which said sums petitioner was legally bound to pay, and which these Receivers might not legally refund to petitioner.

By agreement of Counsel said demurrer was set down for hearing before me on Tuesday, the 28th day of September 1909, at 10 o'clock A. M. at the office of the clerk of the above entitled Court. At said time and place Frank J. Loesch, Esq., appeared as Solicitor for the petitioner and Mr. F. S. Winston, as Solicitor for the Receivers and the C. G. W. R. R. Co. Mr. P. J. Farrell, Solicitor for the Interstate Commerce Commission appeared as amicus curiæ.

The questions raised by said demurrer were fully argued by Counsel and briefs were submitted with reference thereto. After due consideration thereof, I respectfully report that said demurrer is well founded in point of law and should be sustained by the Court. I therefore respectfully recommend that an order be entered to that effect and that in and by the terms of said order the intervening petitioner be denied any relief by reason of the facts set up by it in its petition.

All of which is respectfully submitted.

Settled as per attached Notice and Dated, this March 16th, 1910.

A. R. MOORE,
Special Master.

(Endorsed:) Filed March 16, 1910. H. S. Stoddard, Clerk.

116 And on the same day to-wit: the sixteenth day of March, 1910, there was filed in the Clerk's office of said Court in said entitled cause certain Objections to Special Master's Report in words and figures following to-wit:

117 *Objections to Special Master's Report.*

In the Circuit Court of the United States, Northern District of Illinois, Eastern Division.

JOHN A. HUMBIRD et al., Complainants,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY, Defendant.

In re Intervening Petition of the Postal Telegraph-Cable Company.

Objections to Special Master's Report.

Objections taken by the above named intervening petitioner to the report of A. R. Moore, the special master in chancery to whom this cause stands referred for investigation and report on the intervening petition of Postal Telegraph Cable Company.

First. For that the said Special Master has found and reports that

the demurrer filed to said intervening petition is well founded in point of law and should be sustained by the Court; whereas the said Special Master should have found and reported that said demurrer to said intervening petition is not well founded in point of law and should be overruled by the Court.

Second. For that the said Special Master has recommended that an order be entered sustaining said demurrer and that in and by the terms of said order the intervening petitioner be denied any relief by reason of the facts set up by it in its petition; whereas the said Special Master should have recommended that an order be entered overruling said demurrer and requiring said receivers
118 to plead to or answer said intervening petition within a short day to be fixed by the terms of said order.

Third. For that the said Special Master should have found that the petitioner, Postal Telegraph-Cable Company by its petition has stated a cause of action which entitles it to the relief as therein prayed for.

In all of which particulars the said Intervening petitioner objects to the said report, and submits that the same ought to be altered and varied.

WILLIAM E. O'NEILL,
Solicitor for Postal Telegraph-Cable Company, Intervening Petitioner.

The foregoing Objections are each overruled and my report settled as originally drafted.

Dated March 16th, 1910.

A. R. MOORE,
Special Master.

(Endorsed:) Filed March 16, 1910. H. S. Stoddard, Clerk.

[Endorsed:] Circuit Court of United States, Northern District of Ill., Eastern Division. John A. Humbird et al., Complainants, vs. Chicago Great Western Railway Company, Defendant. Re Intervening Petition of Postal Telegraph Cable Company. Objections to Special Master's Report. William E. O'Neill, Attorney for Intervening Petitioner.

119 And afterwards to-wit: on the fourth day of April, 1910, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

28934.

JOHN A. HUMBIRD et al.

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY.

This cause having come on to be heard upon the written stipulation of the parties hereto by their respective attorneys, and the court

being fully advised in the premises, it is hereby ordered that the objections heretofore filed by Postal Telegraph-Cable Company to the report of the Special Master in Chancery, stand as exceptions to such report, before the Court, and that the hearing on said exceptions be, and the same is hereby set for the fourth (4th) day of May, A. D. 1910, at the hour of ten (10) o'clock A. M.

120 And on to-wit: the fourth day of May, 1910, in the record of proceedings thereof, in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

28934.

JOHN A. HUMBIRD et al.

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY.

Now come the parties by their solicitors and now comes on to be heard the exceptions of the Postal Telegraph Cable Company to the Special Master's Report, heretofore filed herein; and the Court, having heard the arguments of counsel to conclusion, overrules said exceptions; and thereupon it is ordered that the said Master's report be, and the same is, hereby approved. And thereupon the demurrer of the receiver to the petition of said Postal Telegraph Cable Company is heard and sustained; and it is further ordered that the said petition be, and the same is, hereby dismissed at the petitioner's costs.

And thereupon the said petitioner enters its motion for an appeal to the Supreme Court of the United States.

121 & 122 NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing ~~4~~ to be true and complete copies of the certain Order entered of record in the Circuit Court of the United States for the Northern District of Illinois, on the twenty-third day of January, 1908, appointing Special Master in Chancery, Intervening Petition of the Postal Telegraph-Cable Company, filed May twentieth, 1909, Demurrer of Receivers, filed June eighth, 1909, Special Master's Report, filed March 16, 1910, Objections filed to Special Master's Report, March sixteenth, 1910, Order entered of record April fourth, 1910, and Order entered of record May fourth, 1910, in the cause entitled, John A. Humbird, et al., Complainants, vs. Chicago Great Western Railway Company, Defendant, as the same appear from the original Records and Files thereof, now remaining in my custody and control. In Testimony Whereof, I have hereunto set my hand and

affixed the seal of said Court, at my office, in the City of Chicago, in said District, this twenty-fourth day of April, 1916.

[Seal Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MacMILLAN, *Clerk.*

123 [Endorsed:] P. Ex. 5. June 21, '16.

124 PLAINTIFF'S EXHIBIT No. 6.

In the District Court of the United States for the District of Maryland.

No. 56. Equity Docket "F."

WESTERN UNION TELEGRAPH COMPANY, a Corporation,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation.

Docket Entries.

Aug.	1, 1908.	Bill of Complaint and Exhibit "A," filed.
"	" "	Præcipe for Subpœna, filed.
"	" "	Subpœna issued ret'ble first Monday of September next.
		(Summoned the Baltimore and Ohio Railroad Company, by service on Hugh L. Bond, its 2nd Vice President, and copy Subpœna in Equity left with him August 3, 1908.)
Oct.	7, "	Answer filed.
"	16, "	Complainant's motion to set this cause for argument on bill and answer filed. (Notice admitted.)
Dec.	16, "	Petition of Complainant and Defendant for an order of Court requiring notice of the pendency of this case and a statement of the issues involved to be served upon the Interstate Commerce Commission with leave to said Commission to be represented upon the hearing by counsel who shall appear as a friend of the Court, filed.
"	21, "	Order of Court on foregoing petition granting same, filed.
Mch.	3, 1909.	Brief by the Interstate Commerce Commission, filed.
Apr.	14, "	Replication filed.
Apr.	14, "	5 Copies Brief and Argument of Complainant, filed.
"	" "	5 Copies Reply Brief of Complainant, filed.
June	22, 1910.	Decree of Court that the Complainant have leave to withdraw its suit without prejudice, the complainant to pay all costs, filed.

125 & 126 UNITED STATES OF AMERICA,
District of Maryland, To-wit:

I, Arthur L. Spamer, Clerk of the District Court of the United States for the District of Maryland, do hereby certify that the aforegoing is a true copy of the Docket Entries, taken and copied from the record of proceedings in the therein entitled case of Western Union Telegraph Company, a corporation, vs. Baltimore and Ohio Railroad Company, a corporation, No. 56 Equity Docket "F," in said District Court, transferred from the Circuit Court of the United States for the District of Maryland by Act of Congress, approved March 4th, 1911.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, this 8th day of June, 1916.

[Seal United States District Court, Maryland.]

ARTHUR L. SPAMER, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, 10 cents, canceled 6, 18, '16. A. L. S.]

127 In the United States Circuit Court for the District of Maryland.

WESTERN UNION TELEGRAPH COMPANY, Complainant,

against

THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

Bill of Complaint.

Henry D. Estabrook, Solicitor for Complainant.
John F. Dillon, Rush Taggart, George H. Fearons, of Counsel.

128 In the United States Circuit Court for the District of Maryland.

WESTERN UNION TELEGRAPH COMPANY, Complainant,

against

THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

Bill of Complaint in Equity.

To the Honorable the Judges of the Circuit Court in and for the Fourth Judicial Circuit and District of Maryland at Baltimore:

The Western Union Telegraph Company, a corporation duly organized under the laws of the State of New York and a citizen and resident of said State, having its principal place of business in the State of New York and in the Southern District thereof, brings this its bill of complaint against the Baltimore and Ohio Railroad Com-

pany, a corporation organized under the laws of the State of Maryland, and a citizen and resident of said State, and having its principal place of business in the City of Baltimore, State of Maryland, and says:

1. That this case is one wholly between citizens of different states and that the subject-matter thereof and the amount in con-
129 troversy is of the value of more than two thousand dollars exclusive of the interest and costs, and is also one arising under the Constitution and laws of the United States.

2. That your orator, the Western Union Telegraph Company, is a telegraph company and a corporation duly organized and existing under an Act of the Legislature of the State of New York entitled "An Act to provide for the incorporating and regulating of telegraph companies," passed on the 12th day of April, 1848.

3. That the Baltimore and Ohio Railroad Company is a corporation organized and existing under the laws of the State of Maryland, and owns, controls and operates the following lines of Railway:

From Philadelphia, Pennsylvania, to Baltimore, Maryland; from Baltimore, Maryland, to Washington, District of Columbia; from Baltimore, Maryland, westward through the states of Maryland, Virginia, West Virginia, Pennsylvania, Ohio, Indiana and Illinois, and reaching, among others, the cities of Pittsburg, Wheeling, Cleveland, Columbus, Cincinnati and Chicago.

4. That your orator was thus organized as a telegraph company in the year 1851, and immediately thereafter began the work of construction and operation of Telegraph lines in the State of New York and other states, and has continuously, since that time, been engaged in the work of constructing and operating telegraph lines for the rapid dissemination of intelligence, and has constructed and acquired a continuous system of telegraph lines which now extends through all the states and territories of the United States and into portions of the Dominion of Canada, and connects with telegraph lines in the Republic of Mexico and through the said land-lines of Mexico with the telegraph lines of the Central and South American Republics and by means of submarine cables with the telegraph systems of foreign countries; that at the present time its
130 system of telegraph lines operated and controlled by it, as aforesaid, comprises over 200,000 miles of poles and cables, and over 1,000,000 miles of wire; that upon the said system of telegraph lines your orator has nearly 25,000 offices (about 20,000 of said offices being railroad offices yielding revenues too small to pay for separate maintenance), and transmits yearly about 65,000,000 messages for the public and for the Government of the United States, and for the governments of foreign countries, exclusive of messages transmitted upon railway business, exclusive of office messages for your orator and exclusive also of messages forwarded by private parties leasing wires from your orator; that said system of lines has been built up so as to connect with and be largely operated from the central office of your orator, which is situated in the City of New York, and the said lines radiate therefrom to all the important cities and commercial centres and to many thousand towns

and villages in the United States and in North America and through the ocean cables and land lines above described to all the important commercial centres of this continent and the continent of Europe, and through lines there situated with the telegraph lines in all parts of the world; that among the lines of telegraph forming an important part of said system of your orator and connected with its main office as aforesaid in the City of New York and connecting with other lines of telegraph leading to the important commercial centres of the South, the West and Southwest, are lines of telegraph over and along the said Baltimore and Ohio Railroad and along the branches thereof, connecting with lines reaching to the Pacific Ocean and to the South, West and Southwest, and through those lines to Mexico, Central and South American countries and through the Pacific Ocean cables to China, Philippine Islands and Japan.

5. Your orator avers that on, to wit, the 15th day of October, A. D. 1887, it entered into a certain written contract with the
131 said Baltimore and Ohio Railroad Company, contracting therein for itself and for all the railroads and railway companies whose lines of railroad were then owned, leased or controlled by the said Baltimore and Ohio Railroad Company, or which were thereafter to be owned, leased or controlled by said Railroad Company through ownership of stock or otherwise during the continuance of said agreement, a copy of which said contract is hereto attached, marked "Exhibit A" and made part of this bill of complaint.

6. By the terms of said contract the said Telegraph Company, your orator, agreed to construct, maintain, repair and reconstruct various telegraph lines for the mutual use of said Telegraph Company and said Railroad Company according to the terms set forth in said agreement; further agreeing to change from time to time the location of any of the wires, poles or cables upon the right of way or property of said Railroad Company in such manner as the proper officers of the Railroad Company might direct so as not to interfere with the operations of said railroad, or to place the wires in underground conduits in cities and towns along said railroad, wherever necessary, in accordance with the terms of said contract. Said Telegraph Company further agreed to furnish to said Railroad Company, free of cost, the use of its main batteries for the efficient operation of all railroad wires, and also all instruments, local batteries, stationery and other material for commercial business, granting to said Railroad Company for use upon the railroad wires all telegraphic patents which the Telegraph Company or its subordinate companies now or hereafter might own, as provided in said contract; agreeing also that in addition to exclusive wires for railroad operations, said Railroad Company should have the joint use of the wires of the Telegraph Company for important railroad messages directing the movement of trains, such messages having precedence as provided in said contract; and said Telegraph Company further agreed
with said Railroad Company that it would receive and
132 transmit over its said lines along said railroad, in the order in which they and other messages might be filed with it, and

would deliver with promptness and despatch and free of charge, the messages of the officers and agents of the Railroad Company pertaining to its railroad business between all cities, towns and places now reached by said telegraph lines on said railroads; expressly agreeing that all such messages should be received at and delivered from any of the offices of the Telegraph Company or its subordinate companies in any of the said cities, towns and places, and when so received should be transmitted by the Telegraph Company over said telegraph lines free of charge; and that if for any reason or convenience to the Telegraph Company any of said messages should be transmitted by other lines to the place of destination no charge should be made therefor. Said Telegraph Company further agreed with the said Railroad Company to issue to such officers of the Railroad Company as might be designated by the president or other authorized officer thereof annual franks authorizing the free transmission of messages relating strictly to the railroad business of the Railroad Company's railroads covered by this agreement, originating at and destined to points on the lines then owned or thereafter owned or operated by the Telegraph Company, or its subordinate companies, in the Telegraph Company's general telegraph system, beyond or off the line of said railroads to an amount not exceeding $10,000 per annum calculated at the regular commercial day rates of the Telegraph Company between the points at which such messages should originate and the points to which they might be destined; and the said Railroad Company agreed in said contract to pay the Telegraph Company one-half of its aforesaid rates on all such messages in excess of said amount of $10,000 per annum, settlement to be made yearly. It was further understood and agreed between the parties to this suit that the free telegraphic service provided for in said contract should apply only to the transmis-
133 sion of messages concerning the operation and business of the Railroad Company's railroads covered by said agreement and should not be extended to any messages for transmission by cable, nor to messages ordering steamer berths, merchandise or accommodations for customers of the Railroad Company, the tolls on which messages should be properly chargeable to such customers. And said Telegraph Company further agreed to pay to the said Railroad Company the sum of $60,000 per annum in equal instalments of $5,000 at the close of each month during the continuance of said agreement, accounting therefor from October 15th, 1887.

7. That at all times since the making of the said contract hereinbefore set forth as Exhibit A, your orator has observed, kept and performed all the obligations and requirements of the said contract on its part to be observed, kept and performed, and has faithfully carried out all the provisions thereof and has expended large sums of money in furnishing facilities to the said defendant railway company and the use of valuable patents, batteries and instruments, the said expenditures by your orator under said contract Exhibit A amounting in the aggregate to many hundred thousand dollars, and the said defendant herein, the Baltimore and Ohio Railroad Company, has at all times availed itself of the facilities thus afforded by

your orator without complaint on its part that your orator was in any respect delinquent in failing to render to the said Baltimore and Ohio Railroad Company all the service and benefits that it was entitled to receive and enjoy under each and every of the provisions of the said contract.

8. And the said defendant Railroad Company on its part agreed in said contract to transport free of charge over its said railroads, on application of the superintendent or other proper officer of the Telegraph Company, all employees of said Telegraph Company when traveling on the business of said Company or engaged in its work along said railroads and likewise to transport and distribute,
131 free of charge, all poles and other materials and supplies of the Telegraph Company for the construction, maintenance, renewal and reconstruction of said telegraph lines named in said contract along said railroads, and of such additional wires as from time to time might be erected on said telegraph lines, and for other lines and wires in said contract provided for, on extensions, branches and acquired roads, and also all material and supplies for the establishment, maintenance and operation of the telegraph offices of both parties to said contract at places along said railroads. And the said defendant Railroad Company also agreed to transport, free of charge, employees of the Telegraph Company when traveling on its business or engaged in its work, and the poles and other materials and supplies of the Telegraph Company required for the construction, maintenance, renewal and reconstruction of other telegraph lines of the Telegraph Company than those enumerated in said contract, whether such lines should be on or off the line of said railroads, to the amount not exceeding $10,000 per annum, calculated at the current transportation rates of the Railroad Company; and the said Telegraph Company agreed in said contract to pay to the Railroad Company one-half of its aforesaid rates on all such transportation of employees and poles and other material in excess of said amount of $10,000 per annum, settlements to be made yearly.

9. And said agreement contained other covenants on the part of both said telegraph and railroad companies for the mutual maintenance, operation and control of said telegraph lines, all of which are set forth in the written contract hereto attached as Exhibit A, but which your orator is advised it is unnecessary to set forth with greater particularity in this its bill of complaint.

10. Your orator further avers that said contract was continuously and in good faith observed and performed by the parties
131½ thereto until October 1st, 1906, when your orator was informed by the defendant that because of the enactment by Congress of the act entitled "An Act to regulate commerce," approved February 4th, eighteen hundred and eighty-seven, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission, it would not further perform said contract so far as furnishing interstate transportation for employees and material in connection with the construction, maintenance and operation of telegraph lines off the lines of its said railroad, and that it would thenceforth demand and exact of your orator the usual and

full rates of carriage on all materials and supplies for repairs, improvements, renewals or extensions of said telegraph lines consigned to points off the line of defendant's railroad, and would demand and exact of your orator the usual full passenger and freight rates for carriage over said lines of railroad for such of the employees of the complainant and material of the complainant as were traveling to points off the line of said defendant's railroad, albeit that such interstate shipments and transportation were in the interest of your orator's business and the maintenance, inspection and operation of said telegraph lines and included in and covered by said contract; and that for all such interstate transportation during the whole of the contract year 1906-7 said defendant Railroad Company did demand, and still continues to demand, of your orator payment in money at the usual and full passenger and freight rates of said Railroad Company. And the defendant then and ever since has asserted and now asserts that the performance of the obligations assumed by and imposed upon it in and by said contract in this respect is within the prohibition of said Hepburn Act save upon payment therefor in money at the usual and full rates, and that said statute of Congress applied not only to contracts between railroad and telegraph companies for the mutual exchange of services but in effect, and to the extent indicated, annulled the contract existing between your orator and this defendant, and that in these particulars the
134¾ contract should be and by the defendant was considered
as annulled and that the defendant would not longer observe nor further perform it although insisting upon the full performance thereof by your orator in all the obligations assumed by it.

11. Your orator avers that the defendant has misconstrued the purpose and the intention of the said Act of Congress hereinbefore named, and that said Act and the Act to which the said Act is an amendment does not justify the defendant in violating its contract with your orator; that the purpose of said Act and of the Act of which the same is amendatory, is to prohibit and prevent discriminations by common carriers in favor of one shipper or passenger as against other shippers and passengers in like case, and that all inhibitions and prohibitions of said Act are directed to the securing of equality of service by common carriers of customers of such common carriers, whether they are shippers of goods or passengers. But your orator protests that the relation of shipper and carrier was not created by the contract, "Exhibit A," hereinbefore set forth, nor by the terms of said contract was or is the defendant obliged to omit or forego any duty imposed upon it by law, that, as will hereafter fully and clearly be set forth, a joint relation in the construction, maintenance and operation of telegraph lines and property was created by said contract, the said telegraph lines being an indispensable instrumentality for the performance by each of the parties to said contract of the obligations assumed by it in the transactions of its business.

12. Your orator further avers that under the said Contract, "Exhibit A," it has not furnished any free service to the defendant, nor has the defendant furnished any free service

to it in the sense of gratuitous service. That at the time of entering into said contract the value of the services which were to be furnished to your orator by the defendant,
135 including office rents in its stations, hauling of material and supplies, operators to transact the business, transportation for the officers and employes of your orator, and other matters mentioned in said contract were estimated and determined to be equal with other considerations moving from your orator to said defendant under said contract; and your orator avers that whatever service is rendered by either party to said contract to the other, whether in the transportation of freight or passengers or in the transmission of messages, is fully compensated by the service contracted to be rendered by the other party thereto.

13. And your orator avers and makes known to this Honorable Court that one of the first uses of the telegraph after its invention was in connection with the operation of railroads, enabling railway trains to be safely run without danger of collision, and that to the present time railroad companies require telegraph lines for their successful and safe operation; that such lines are required not only along their own lines of railroad but to reach points upon other lines of railroad and hence it is that the construction and operation jointly of telegraph lines by railroad companies and telegraph companies has come to be recognized as a necessity in order that each may best discharge its duties to the general public. And your orator avers that it has contracts with very many railroad companies throughout the United States of similar import to the contract here in controversy, and that in the past whenever any such contract has expired by limitation such contract has almost without exception been renewed or the parties thereto have sought to renew it upon terms mutually advantageous and agreeable to meet changed conditions, the outgrowth of mutual development; that it has been the custom of railroads since the adoption of a standard track gauge to send their freight cars to final destination without unloading over the tracks of other companies, so that as modern railroad operations are conducted the cars belonging to one railroad company are
136 scattered along the tracks of nearly every other railroad company in the United States from the Atlantic Ocean to the Pacific Ocean and from Canada to the Gulf of Mexico; that it is not merely desirable but absolutely necessary that the whereabouts of a particular car of freight should be known to a railroad company at all times, and your orator avers that the only means of obtaining such knowledge is through the instrumentalities of the telegraph; and because of this and other like necessities of said railroad companies there has grown up what is known as the free service in telegraph contracts; that is, the right to transmit messages over the lines of a telegraph company not upon the line of the particular railroad companies contracting with it, and in this particular each railroad company contracting with your orator is interested not only in the construction, maintenance and operation of the telegraph lines upon its own line of railroad but in the construction, maintenance and operation of the other telegraph lines belonging to your orator.

But your orator avers that none of said service is free but the same is fully compensated for by the other considerations in said contract, and the same is true with respect to the so-called "free" transportation of employees and materials also stipulated for in said contract. And your orator further avers that the use of the telegraph has become a necessity to the traveling public, so that whether or not a railroad company would be under any legal obligation to supply telegraphic facilities to its patrons it would be regarded by the public as most unusual for such facilities to be withheld. And hence it is, may it please this honorable Court, that railroad companies enter into contracts with telegraph companies to furnish telegraphic facilities both for the conduct of railroad operations and for the accommodation of the general public. And your orator avers that in negotiating such contracts railroad and telegraph companies have met, each endeavoring to secure the maximum of facilities for itself and the general public for the least expenditure of money and material, and that it frequently requires months and years of ne-
137 gotiation to reach a final agreement, and that such mutual advantages as the consummated contract gives to the railroad and telegraph companies find expression in lower railroad and telegraphic rates to the general public. And your orator avers that it would be neither expedient nor possible for a railroad or a telegraph company to enter into a contract for the joint construction, maintenance and operation of telegraph lines except such contract was made for a definite period of years. Particularly is this true concerning the telegraph company inasmuch as such contracts involve the erection of telegraph poles along the right of way belonging to the railroad company, and the stringing of numerous wires thereon, thereby incurring an enormous expense that only definite compensation for a definite period would justify.

14. Your orator further says that it stands ready, and is able and willing, and hereby tenders performance and continued performance of each and every provision of the said contract, Exhibit A, to the said defendant company, and of all the conditions and obligations imposed upon your orator by the said contract, and avers that upon such performance on its part it is entitled to require from the defendant company the performance on its part of all the provisions of the said contract.

15. Your orator further avers that if it be mistaken with reference to the correct construction of the said Act of Congress, and if it should be held that it was the intention of Congress to have said statute apply to contracts, such as that between your orator and the defendant, and if it further be held that it was the intention of Congress that said law should be construed so as to make the terms of the existing contract between your orator and the defendant unlawful, then your orator says that, in so far as it attempts to affect the operation of said contract, said act is in violation of the
138 Constitution of the United States and void. But your orator avers in this connection that said contract existing between it and the defendant is a valid, subsisting and existing contract, not in violation of any law of the United States now or when entered

into, not contrary to any public policy, and that it is a valuable property right of which your orator cannot be deprived by any arbitrary exercise of the law-making power, nor in any other manner except by due process of law.

16. Your orator further avers that it has no adequate remedy at law, and that it could not be compensated in damages for the loss which it will sustain by reason of the defendant's attempted breach of said contract; that it has been for many years engaged in building up a business organization through its connection with the various railway lines of the country, the value of which cannot be estimated in money, but would run into the millions of dollars; that to have its said business relations with the defendant and other railway lines arbitrarily destroyed would be in effect to deprive your orator of large property values without due process of law, and to deny to it the equal protection of the law. Your orator further avers that the liberty guaranteed to it by Section 1, Article XIV, of the Constitution of the United States, is the liberty of contract as well as freedom from personal restraint, and that, therefore, if it was the intention of Congress to deprive your orator of the right to make a reasonable contract with a railway company for the interchange of service the said law is in conflict with said Fourteenth Amendment to the Constitution of the United States and void. Your orator further avers that the refusal of the defendant to specifically perform said contract will impose upon your orator the necessity and burden of a great multiplicity of suits for the protection of its rights, in that such refusal will oblige your orator to pay in money for services rendered by the defendant for which, by the said contract, your orator has already rendered full consideration and satisfaction, and compel your orator
139 to sue the defendant for the sum of each such payment, or aggregate of payments, from time to time during the whole term of said contract. That it is impossible to estimate or place a money value upon the damages which your orator will sustain by reason of the defendant's breach of its contract with your orator, nor will it be possible for your orator to sever its business relations with the defendant, annul said contract in entirety and take over the exclusive operation of its telegraph line, independent of any connection whatever with the defendant, without a great loss, which could not be compensated for in damages, and that the effect of the annulment of said contract would be to disrupt and disorganize the entire telegraph system of your orator. Your orator further avers that the defendant's breach of said contract is a continuous breach, and exists from day to day, and that your orator has no adequate remedy at law for the injury thus being inflicted upon it, and in order for it to secure adequate relief it is not only necessary that the defendant be enjoined from any further breach of said contract, but that it be required to continue to observe its said contract between itself and your orator.

Forasmuch, therefore, as your orator can have no adequate relief except in this Court, and to the end that the defendant the Baltimore and Ohio Railroad Company may, if it can, show why your

orator should not have the relief hereby prayed, make full disclosure and discovery of all the matters aforesaid, according to the best of its knowledge and belief, and full, true and perfect answer make to the matters hereinbefore stated and charged, but not under oath, answer under oath being expressly waived, your orator prays that the Court will determine, adjudge and decree that the said contract Exhibit A is still in full force and effect notwithstanding the action of the defendant with respect thereto, and that the Court order, adjudge and decree that the said defendant, the Baltimore and Ohio Railroad Company may be required specifically to perform the said contract Exhibit A, your orator being ready and willing, and hereby offering, specifically to perform said
140 agreement in all things on its part and behalf; and that this Court will further order, adjudge and decree that your orator is entitled to a perpetual injunction herein against the defendant the Baltimore and Ohio Railroad Company restraining it from in any manner violating any of the provisions of the said contract Exhibit A which this Court shall require the said defendant the Baltimore and Ohio Railroad Company specifically to perform on its part, and meanwhile and until the final decree of this Court that a temporary injunction be issued against the defendant prohibiting and restraining it from in any manner violating any of the provisions of said contract Exhibit A, and for such other and further relief as the case may require and to your Honors may seem just. May it please your Honors to grant unto your orators the writ of subpœna of the United States of America to be directed to the defendant the Baltimore and Ohio Railway Company, commanding it, by a certain day, and under a certain penalty, to be and appear before your Honors in this Honorable Court, then and there to answer all and singular the premises and to stand, abide and perform such order and decree therein as to your Honors shall seem agreeable to equity and good conscience.

This bill of complaint is filed under the corporate authority and corporate seal of the complainant.

——— ———, *President.*

Attest:

——— ———, *Secretary.*

HENRY D. ESTABROOK, *Solicitor.*

JOHN F. DILLON,
RUSH TAGGART,
GEORGE H. FEARONS,
Of Counsel.

141 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Robert C. Clowry, being duly sworn, says he is President of The Western Union Telegraph Company, plaintiff in the above-entitled action; and is familiar with the affairs of said corporation; that he

has read the foregoing petition and knows the contents thereof and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

——— ———.

Sworn to before me this — day of ———, 1908.

——— ———.

142 EXHIBIT A.

This agreement made this 15th day of October, 1887, by and between the Western Union Telegraph Company, hereinafter called the "Telegraph Company," party of the first part, and the Baltimore and Ohio Railroad Company, hereinafter called the "Railroad Company," party of the second part,

Witnesseth:

Whereas an agreement of date October 5th, 1887, was made between the Telegraph Company and the Railroad Company, under which the Telegraph Company acquired from the Railroad Company certain Telegraph property, rights and interests, and by the terms of which it was agreed that an operating contract should be made between the Railroad Company and the Telegraph Company, covering the telegraph lines on the railroads owned, operated or controlled by the Railroad Company.

Now therefore in order to carry out the said provisions for the execution of an operating contract, it is mutually agreed between the parties hereto as follows:

First. The railroads now owned, operated or controlled by the Baltimore & Ohio Railroad Company, and referred to herein, are shown on Schedule A, hereto attached.

Second. The Telegraph lines specifically covered by this contract are shown on Schedule B and the wires thereon are of two kinds, designated on said Schedule as:

(*a*) Exclusive railroad wires,

(*b*) Commercial wires.

The term "exclusive railroad wires" shall be deemed to include the necessary instruments, switches, local batteries, loops and connections as now located, arranged and used on said wires, and as are necessary to continue in operation, the existing effective telegraphic circuits between the several stations and offices of
143 the Railroad Company in the various Cities, Towns and places on the route of the said railroads, and also one wire between Philadelphia and New York City, together with the existing local wires in New York City now connecting the various offices and piers of the Railroad Company as now located and arranged, and as shown in said Schedule B.

Third. The Railroad Company retains the ownership of the "exclusive railroad wires," as above defined.

Fourth. The Telegraph Company agrees to maintain, repair and reconstruct at its cost, in first class condition, all the said telegraph

lines and such additional wires as either the Telegraph Company or the Railroad Company may place thereon, the Railroad Company, however, furnishing the necessary unskilled labor for such maintenance, repairs and reconstruction of said lines and of said additional wires along said railroads; and also furnishing the necessary wire and material (not however including brackets and cross arms) for the maintenance, repair and reconstruction of the "exclusive railroad wires." The term "unskilled labor" shall not include either foremen, linemen, climbers, framers, nor any other laborers who require special skill in connection with telegraph construction and maintenance in order to properly perform the service, but shall include all the labor necessary to dig holes and set, reset and handle poles and other material; nor shall the Railroad Company furnish any tools required in connection with such work.

It is agreed that the location of any of the poles, wires or cables upon the right of way or property of the Railroad Company, shall from time to time, be changed thereon in such manner as the proper officers of the Railroad Company may direct, so as not to interfere with the operations of the Railroad, the Telegraph Company furnishing the skilled labor, and the Railroad Company the unskilled labor for such work.

Fifth. It is agreed that the Railroad Company shall have the right from time to time to acquire from the Telegraph Company or to erect necessary additional "exclusive railroad wires"
144 upon and along the telegraph lines of the Telegraph Company named in Schedule B, the Railroad Company paying the cost of the wire, insulators, and other material (not however, including brackets and cross arms) and the cost of the erection and equipment thereof; it being understood that where such wire acquired or erected is laid in cable in whole or in part, the Railroad Company shall only be charged with the pro rata cost of such conductor or conductors in said cable, as may be set apart for the exclusive use of the Railroad Company, and the pro rata rental of ducts in which the same may be placed. It is agreed however that if the Telegraph Company shall remove its poles and fixtures from any route of said Telegraph lines shown in Schedule B, in any City, Town or place, and re-locate the same in underground conduits or other structures, then the Telegraph Company shall remove the exclusive railroad wires from such poles and fixtures and place the same in such conduits or other structures or substitute new wires therefor in such conduits or other structures, the Railroad Company paying the cost of removing such wires and placing the same in said conduits or other structures, or the cost of such new wires and the pro rata rental of said conduits or other structure or the pro rata cost of construction thereof.

The Railroad Company shall not be required however to furnish any unskilled labor for maintenance, renewal, or reconstruction of any part of said telegraph lines not upon or along or adjacent to its right of way. And the Telegraph Company shall, upon the request of the Railroad Company connect by overhead wires the present

"exclusive railroad wires," and such as may be hereafter acquired or erected as herein provided, with additional offices, stations and buildings of the Railroad Company, in the several Cities and Towns on the route of said railroads, and also in the Cities of New York and Brooklyn, if and so long as the Telegraph Company shall have poles or house top fixtures available for reaching such additional offices, stations and buildings, and the Railroad Company agrees to
145 pay the cost of the wire, insulators and other material and the cost of the erection and equipment thereof; and also to pay any bridge and house top or fixture rentals which the Telegraph Company may have to pay for such wires. It being understood that in cases where it may be necessary to use aerial cables in the acquisition or erection of such additional wires and connections the Railroad Company shall only be charged with pro rata cost of such conductor in said aerial cable or cables as may be set apart for the exclusive use of the Railroad Company.

If the Telegraph Company shall have an underground conduit available for reaching the Railroad Company's offices, stations and buildings in any such town, City or place, the Telegraph Company will furnish the Railroad Company such connecting wires as the Telegraph Company may be able to supply in the said conduit or conduits used by it, the Railroad Company hereby agreeing to pay to the Telegraph Company the entire cost of the wire and of placing the same in the conduit, and the pro rata cost of construction or rental and maintenance of such conduit or conduits.

Sixth. The Telegraph Company shall furnish, free of cost, the use of its main batteries for the efficient operation of all railroad wires and also all instruments, local batteries, stationery and other material for commercial business, and hereby grants to the Railroad Company for use, upon the railroad wires, the free use of all telegraphic patents, which the Telegraph Company or its subordinate Companies, now, or hereafter own, or own and use for the general telegraph business; but this grant shall not require the Telegraph Company to make any payments on account of such free use to any minority interests in such subordinate Companies, but any such payments to minority interests shall be chargeable to the Railroad Company.

It is understood and agreed that the Railroad Company shall furnish all instruments, local batteries, stationery and other material for railroad business.

146 Seventh. The Railroad wires shall be used only by the Railroad Company for its railroad business, and shall not be used for the transmission of any commercial or public telegraph business, for tolls, except as hereinafter set forth. It is agreed, however, that where there is but one wire, as shown on said Schedule B., it may be used jointly by the Telegraph Company with the Railroad Company, important railroad messages, directing the movement of trains, having precedence, until such time as in the judgment of the President of the Railroad Company such joint use may be detrimental to the business of the Railroad Company, and in such case the Telegraph Company shall erect an additional wire for commercial business. In all other cases the railroad wires may from time to time be used by

the Telegraph Company jointly with the Railroad Company with the Railroad Company's assent, when not in use for railroad business.

Whenever the railroad wires have become disabled the Railroad Company shall have the right to take and use jointly with the Telegraph Company any of the working commercial wires for the purpose of moving its trains or transacting other important and urgent railroad business, such use to continue without cost to the Railroad Company until the repair of the railroad wires has been affected and the circuits restored.

But the through commercial wires or circuits shall not be subject to such use by the Railroad Company, except in cases of extreme emergency.

Eighth. Either party to this agreement may establish and maintain telegraph stations at such places on said railroads as it may deem necessary.

At all telegraph stations of the Railroad Company, it shall furnish operators at its own expense; and its operators and other employees acting as agents of the Telegraph Company, shall receive, transmit, and deliver, exclusively for the Telegraph Company, such commercial or public messages as may be offered, and shall charge the tariff rates of the Telegraph Company thereon; and shall render to the Telegraph Company exclusively, monthly statements of such business and
147 full accounts of all receipts therefrom, and shall pay all of such receipts to the Telegraph Company in such manner and at such times as it may direct, but it is understood that in the transaction of all such telegraph business said operators and all other employees shall be held to be only the agents of the Telegraph Company, and shall conform to all rules, regulations and orders of the Telegraph Company applicable to all telegraph business, whether paid or free.

And said operators and other employes shall not, without the consent of the Telegraph Company transmit over the Telegraph lines covered by this agreement, any free messages except those herein provided for.

Whenever the number of paid and collect messages sent from any railroad office amounts to 3,000 or more in any one year, (30 words of press matter sent being counted as one message) the Telegraph Company shall thereafter provide an operator for such office, so long as said messages amount to said number, and said operator acting as the agent of the Railroad Company shall attend to the telegraph business of the Railroad Company without charge, so long as one operator can attend to the telegraph business of both parties. No employee of the Railroad Company shall while in its service be employed in the transaction of commercial or public telegraph business by or for any party other than the Telegraph Company; and the Telegraph Company shall have the exclusive right to the occupancy of the Railroad Company's depots and station houses for commercial or public telegraph business as against any other party.

Ninth. If the Telegraph Company elects to establish an office in a station building of the Railroad Company the Railroad Company shall, if it can conveniently furnish the space therefor, provide office room in such building and light and fuel therefor, free of charge,

and if at such station one person can attend to the telegraph business of both Companies, the operator of the Telegraph Company at such office, acting as the agent of the Railroad Company, shall attend to the telegraph business of the Railroad Company without charge, and shall conform to all the rules and regulations of the Railroad Company applicable thereto.

Whenever the telegraph business of both Companies at any office where the Telegraph Company furnishes the operator becomes so large as to require more than one operator, then the Railroad Company shall employ and pay its own operator.

Tenth. The Telegraph Company shall receive and transmit over the said lines along said railroads, in the order in which they and other messages shall be filed with it, and shall deliver, with promptness and despatch, and free of charge, the messages of the officers and agents of the Railroad Company pertaining to its railroad business between all Cities, Towns and places now reached by said telegraph lines on said railroads.

And it is expressly agreed that such messages shall be received at and delivered from any of the offices of the Telegraph Company or its subordinate Companies in any of the said Cities, Towns and places and when so received shall be transmitted by the Telegraph Company over said telegraph lines free of charge. And if the same for any reason of convenience to the Telegraph Company shall be transmitted by other lines to the place of destination, no charge shall be made therefor.

The Telegraph Company agrees to issue to such officers of the Railroad Company, as may be designated by the President or other authorized officer thereof, annual franks authorizing the free transmission of messages relating strictly to the railroad business of the Railroad Company's railroads covered by this agreement, originating at and destined to points on the lines now or hereafter owned or operated by the Telegraph Company, or its subordinate Companies, in the Telegraph Company's general telegraph system, beyond or off the line of said railroads to an amount not exceeding ten thousand dollars ($10,000.00) per annum calculated at the regular commercial day rates of the Telegraph Company between the points at
149 which such messages originate and the points to which they may be destined. And the Railroad Company agrees to pay to the Telegraph Company one half of its aforesaid rates on all such messages in excess of said amount. Settlements to be made yearly.

It is understood and agreed that the free telegraphic service herein provided for applies only to the transmission of messages concerning the operation and business of the Railroad Company's railroads covered by this agreement, and shall not be extended to any messages for transmission by cable, nor to messages ordering steamer berths, merchandise or accommodations for customers of the Railroad Company, the tolls on which messages should properly be chargeable to such customers.

Eleventh. The Railroad Company agrees to transport, free of charge over its said railroads, on application of the Superintendent or other proper officer of the Telegraph Company, all employees of

the Telegraph Company when traveling on its business or engaged in its work along said railroads; and to likewise transport and distribute free of charge, all poles and other material and supplies of the Telegraph Company, for the construction, maintenance, renewal and reconstruction of the said telegraph lines named on Schedule B, along said railroads, and of such additional wires as may be erected on said telegraph lines, and of the lines and wires hereinafter provided for, on extensions, branches and acquired roads, and also all material and supplies for the establishment, maintenance, and operation of the officers of both parties hereto upon said telegraph lines at places along said railroads.

And the Railroad Company also agrees to transport, free of charge, the employes of the Telegraph Company when traveling on its business, or engaged in its work, and the poles and other material and supplies of the Telegraph Company, required for the construction, maintenance, renewals and reconstruction of other telegraph lines of the Telegraph Company than those hereinbefore named
150 whether on or off the line of said railroads, to an amount not exceeding ten thousand — ($10,000.00) per annum, calculated at the current transportation rates of the Railroad Company; and the Telegraph Company agrees to pay to the Railroad Company one half of its aforesaid rates on all such transportation of employes and poles and other material in excess of said amount. Settlements to be made yearly.

Twelfth. The Telegraph Company agrees to pay to the Railroad Company the sum of sixty thousand dollars per annum, in equal instalments of five thousand dollars at the close of each month, during the continuance of this agreement, accounting from October 15th, 1887.

Thirteenth. It is a condition of this contract that the Railroad Company is not to be responsible for, and the Telegraph Company covenants and agrees to save the Railroad Company harmless and indemnify it against any loss or damages of any kind arising from any injury to persons in the employ of or property belonging to the Telegraph Company, while being carried free or at half rates over said railroads under this agreement, whether such loss or damage arise from the neglect of said Railroad Company or its employes or otherwise, and shall likewise indemnify and save harmless the Railroad Company from any neglect or failure in the transmission or delivery of messages for any person doing business with the Telegraph Company, and on account of any other public telegraph business; and the Telegraph Company shall not be responsible for and the Railroad Company agrees to indemnify and save it harmless against any loss or damages of any kind arising from or on account of any error or failure delay or default in the transmission or delivery of any and all messages sent for the Railroad Company under this agreement.

Fourteenth. Neither the general terms of this agreement nor any stipulation contained herein shall have the effect of creating a covenant of quiet enjoyment, either expressed or implied, on the part of the Railroad Company, and in favor of the Telegraph Com-
151 pany, as against the owner of the fee simple of the land over

which the Railroad Company or of any of its subordinate Companies, has the right of way. Nor as against the exercise of the power of eminent domain on the part of any other Companies possessing it by grant from any state, or of the United States.

And it is further agreed that if anything herein contracted to be done, or not to be done shall be held to be invalid for want of corporate or legal authority to make an agreement to such an extent, it shall not give to either party any claim for damages by reason of any excess or defect of corporate or legal authority in so doing.

Fifteenth. Should the Railroad Company build new extensions or branches or acquire other railroads by purchase, lease, ownership of stock or otherwise, then the provisions of this contract shall apply thereto and to the telegraph lines thereon, to the same extent as if such telegraph lines and railroads had been included in said Schedule-A, and B.; and if there be no telegraph line on such roads then the Telegraph Company shall furnish material and construct one thereon, and maintain, repair and reconstruct the same, the Railroad Company hereby agreeing to furnish the unskilled labor for such construction, maintenance, repair and construction of such line, and of such additional wires as may be erected thereon; and the Telegraph Company will set apart thereon for the Railroad Company's railroad business one exclusive railroad wire. If there be a telegraph line owned, leased or controlled by the Telegraph Company already erected on any such road then there shall be set apart for the use of the Railroad Company such "exclusive railroad wire or wires" thereon as may have been previously used for railroad business exclusively.

If the Railroad Company shall acquire a telegraph line on any such road, the Railroad Company agrees to sell and the Telegraph Company agrees to purchase, such telegraph line at a valuation to be agreed upon, based on the cost of constructing and equipping
152 a similar line, less the cost of unskilled labor, with a proper deduction for decreased value of the material and equipment of the line as compared with new material and equipment.

If the parties hereto cannot agree upon such valuation, the same shall be fixed by arbitrators to be appointed in the manner hereinafter provided.

Upon all such extensions, branches, and leased controlled or hereafter acquired roads, the Railroad Company shall be entitled to free telegraphic service to the same extent and in the same manner as provided by the first clause of Article 10 hereof on said existing railroads, and the ten thousand dollar per year limit of free telegraphic service, as provided by the second clause of said Article 10, shall be increased six dollars per annum for each mile of such road occupied by the Telegraph Company's lines upon such extensions, branches, leased, controlled, or hereafter acquired roads; and the Telegraph Company shall be entitled to free transportation service for employes poles and other material and supplies to the same extent for use thereon, and in the same manner as provided by the first clause of Article 11 hereof; and the ten thousand dollar per annum limit for free transportation provided for by the second clause of Article 11

shall be increased six dollars per annum per mile of such road occupied as aforesaid.

Sixteenth. The Railroad Company so far as it lawfully may hereby grants and covenants and agrees to assure to the Telegraph Company the exclusive right of way on, along and under the lands, roads and bridges, of the Railroad Company, and any extensions and branches thereof, and any leased, operated or controlled roads, and the full and exclusive use and enjoyment thereof, for the construction, maintenance, operation and use of lines of poles and wires and underground or other lines for commercial or public uses or business, with the right to erect from time to time such additional wires upon the said existing lines of poles and any renewals thereof upon said rail-
153 roads, and also the right to construct one additional line of poles and wires or an underground line upon, along or under said railroads, as the Telegraph Company may deem expedient, but the location of any such additional line of poles and wires, or underground structures, shall be made in such way as not to interfere with the operations of the Railroad Company, and at such places on the right of way or lands of the Railroad Company as shall be designated by the proper officer of the Railroad Company. And the Railroad Company agrees to clear and keep clear said right of way of all trees, undergrowth and other obstructions to the construction and maintenance of the lines and wires provided for herein, so far as the Railroad Company legally may.

And the Railroad Company will not transport men or material for the construction, maintenance or operation of a line of poles and wire or wires or underground or other telegraph or telephone line in competition with the lines or business of the Telegraph Company, except at and for the Railroad Company's current local rates; nor will it furnish for any competing line any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at other than regular stations, so far as such refusal and limitation of transportation may be lawful; provided, always that in protecting and defending the exclusive grants herein conveyed the Telegraph Company may use or proceed in the name of the Railroad Company or of any subordinate Company whose road or property may be owned, leased or controlled by the Railroad Company, but shall indemnify and save harmless the Railroad Company from any and all damages, cost, charges and legal expenses incurred therein or thereby.

But this contract shall not be held to require the Railroad Company to furnish unskilled labor for the construction, maintenance, removal or reconstruction of any other than said existing telegraph lines and renewals thereof upon said railroads, and the additional wires
154 that may be placed thereon and the lines hereinbefore provided for on extensions, branches and acquired roads.

Seventeenth. The term "Subordinate Companies" as used in this contract, shall be deemed to include all Companies controlled by ownership of stock, lease, contract for operation or in any other manner by either of the parties hereto.

And the term "telegraph line" or "telegraph lines" shall be

deemed to include the line of poles, wires, cable and cables thereon, batteries connected therewith, and other devices necessary for their efficient telegraphic operation.

Eighteenth. It is mutually understood and agreed that the telegraph lines, poles, wires and fixtures covered by this contract, shall form part of the general telegraphic system of the Telegraph Company and shall be controlled and regulated by the Telegraph Company, which shall fix and determine all tariffs for the transmission of messages and all connections with other lines and interests.

And the Railroad Company expressly agrees that no wire now or hereafter owned, leased, controlled or used by it, shall at any time be used or employed directly or indirectly in competition with the Telegraph Company, or by or for any party other than the Railroad Company and the Telegraph Company, and the Railroad Company will not at any time during the continuance of this agreement engage in or transact any commercial or public telegraph business excepting for the Telegraph Company under the provisions of this agreement.

Nineteenth. It is agreed that the management and control of the railroad employes so far as engaged in telegraphic duties upon said railroads and of employes of the Telegraph Company engaged in the maintenance, repair, renewal or reconstruction of said telegraph lines along said railroads, and the distribution of men, material and supplies therefor, shall be vested in a competent joint Superintendent of telegraph who shall be appointed and whose salary shall be
155 fixed by the Railroad Company, with the approval of the Telegraph Company; and the salary of said joint Superintendent shall be paid equally by the Railroad and Telegraph Company and said Joint Superintendent shall be removable for cause by either party and shall be subordinate to and under the control of the Telegraph Company, so far as necessary to enforce said Company's rules, regulations and orders regarding the maintenance, repair, renewal or reconstruction, operation, management and arrangement of said Company's lines, and the transaction of the commercial telegraph business upon said railroads; and said Joint Superintendent shall decide upon the number of linemen to be employed for ordinary repairs and the places at which they shall be stationed after consultation with both parties hereto; and he shall also be subordinate to and under the control of the Railroad Company so far as necessary to enforce said Company's rules, regulations and orders regarding the maintenance, management, arrangement and operation of said Company's exclusive railroad wires. It being understood and agreed that he shall co-operate with both parties hereto in giving the utmost efficiency to the working of all lines upon said railroads and the proper transaction of the railroad and commercial telegraph business thereon.

The Railroad Company shall furnish office room and light and fuel therefor for said Joint Superintendent and each party shall supply clerical force for its own business.

Twentieth. In case of any disagreement between the parties hereto concerning the meaning of any of the provisions of this agreement or the operations hereunder, such difference shall be

referred to three arbitrators, one to be chosen by each party and the third to be selected by the two thus chosen. And the decision of a majority of such arbitrators shall be final and conclusive upon the parties. In case either party neglects for the period of thirty (30) days to appoint an arbitrator after delivery to
156 it of written notice by the other party, the party not in such default may appoint such arbitrator, and the two thus selected may choose a third, and the decision of a majority of the three thus chosen shall be final and conclusive.

Twenty-first. The execution of this agreement shall terminate all previous agreements now existing or which may be claimed to exist between the parties hereto, or their predecessors of their sub Companies respectively, in the ownership or control of their properties respectively, and covering the construction, maintenance or operation of telegraph lines along the railroads or any of them covered by this agreement; and this agreement shall continue in force for the term of fifty (50) years from October 15th, 1887; and may be renewed after the expiration of said term for further terms of fifty (50) years each by either party giving written notice to the other to that effect at least six months prior to the expiration of the first and each successive period of fifty years. A violation of any of the provisions of this agreement by either party while entitling the other to a claim for damages and the usual remedies for specific enforcement shall not be held to void this agreement or to abrogate the obligations or the undertakings of either party hereto.

In Witness Whereof the parties to these presents have caused the names of their proper officers to be hereunto subscribed and their corporate seals to be attested the day and year first above written.

THE WESTERN UNION TELEGRAPH COMPANY.

(Signed) By JNO. VAN HORNE,
[SEAL.] *Vice-President.*

(Signed) A. R. BREWER, *Secretary.*

THE BALTIMORE AND OHIO RAILROAD COMPANY.

(Signed) By S. SPENCER,
[SEAL.] *President.*

(Signed) ANDREW ANDERSON, *Secretary.*

157 SCHEDULE "A."

List of Railroads Owned, Operated or Controlled by the Baltimore and Ohio Railroad Company.

Philadelphia Division.

Comprising the following lines:

Philadelphia Branch, Baltimore to State line between Delaware and Maryland.

Baltimore and Philadelphia Railroad from State line between Maryland and Delaware to Philadelphia.

Landenburg Branch from Wilmington, Delaware, to Landenburg, Penn.

Schuylkill River East Side Railroad in the City of Philadelphia with Branch line to Delaware River.

Main line and Branches east of the Ohio River as follows:

Main line Baltimore to Wheeling.

Washington Branch, Relay, Maryland, to Washington, D. C.

Curtis Bay Branch, Baltimore to Curtis Bay.

Alexandria Branch, Alexandria Junction to Sheppards.

Metropolitan Branch, Washington, D. C. to Washington Junction, Maryland.

Frederick Branch, Frederick Junction to Frederick, Maryland.

Washington County Railroad, Weverton, Maryland, to Hagerstown, Maryland.

South Branch Railroad, Green Spring to Romney, West Virginia.

Parkersburg Branch Railroad, Grafton to Parkersburg, W. Va.

Fairmont, Morgantown and Pittsburgh Railroad, Fairmont to Morgantown.

158 Pittsburgh Division.—Cumberland, Maryland, to Pittsburgh, Penn.

Salisbury Railroad, Salisbury Junction to West Salisbury, Penn.

Short Line Railroad, O. and B. Junction to Trotter's, Penn.

Hickman Run Branch, Hickman to Cora, Penn.

Somerset and Cambria Railroad, Rockwood to Johnstown Penn.

Berlin Branch, Berlin to Garrett, Penn.

Fayette County Branch, Cromwell to Uniontown.

Mount Pleasant Branch, Broad Ford to Mount Pleasant, Penn.

Wheeling, Pittsburgh and Baltimore Railroad, Glenwood, Penn., to Wheeling, West Virginia.

Harpers Ferry and Valley Branch Division.

Winchester and Potomac Railroad, Harpers Ferry to Winchester.

Winchester and Strasburg Railroad, Winchester to Strasburg.

Harrisonburg and Strasburg Railroad (leased line of Va. Mid.) Strasburg to Harrisonburg.

Trans Ohio Divisions.

Central Ohio Railroad, Columbus to Bellaire, Ohio.

Sandusky, Mansfield and Newark Railroad, Sandusky to Newark, O.

Newark, Somerset and Straitsville Railroad, Newark to Shawnee, Ohio.

Baltimore and Ohio and Chicago Railroads, Chicago Junction to Chicago, Illinois.

159 In the Circuit Court of the United States for the District of Maryland.

WESTERN UNION TELEGRAPH COMPANY, Complainant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

The Answer of the Baltimore and Ohio Railroad Company, the Defendant Herein, to the Bill of Complaint of Western Union Telegraph Company, Complainant.

160 In the Circuit Court of the United States for the District of Maryland.

WESTERN UNION TELEGRAPH COMPANY, Complainant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

The Answer of the Baltimore and Ohio Railroad Company, the Defendant Herein, to the Bill of Complaint of Western Union Telegraph Company, Complainant.

The defendant, The Baltimore and Ohio Railroad Company, now and at all times herein saving to itself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said Bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering says:

1. The defendant admits that it is a corporation organized under the laws of the State of Maryland and a citizen and resident of that State, having its principal place of business in the City of Baltimore, State of Maryland, as alleged in the Bill of Complaint herein.

161 2. The defendant admits the allegations of paragraphs 1, 2, 3, and 4 of the Bill of Complaint herein. The defendant also admits the allegations of paragraphs 5 and 6 of said Bill of Complaint, but for greater certainty as to the intent and terms of the contract therein referred to, begs leave to refer to the full text thereof as set forth in Exhibit "A" of said Bill.

3. Answering the allegations of paragraph 7 of the Bill of Complaint herein, the defendant admits that the complainant has kept and performed the obligations and requirements of the contract, set forth as Exhibit "A" of the Bill of Complaint herein, in all essential particulars, and has for that purpose expended large sums of money in the manner set out in said paragraph 7, and that the defendant has at all times availed itself of the facilities afforded to it by the complainant under said contract without complaint on its part, that

the said complainant was delinquent in performing the said contract in any substantial particular. The defendant further says that all minor failures by the complainant to carry out the terms of said contract have either been adjusted between the parties or are in process of amicable adjustment.

4. The defendant admits the allegations of paragraphs 8 and 9 of the Bill of Complaint herein.

5. The defendant admits the allegations of paragraph 10 of the Bill of Complaint herein and further answering said paragraph the defendant says that on September 15, 1906, the Interstate Commerce Commission in a general tariff circular, formally promulgated the following administrative ruling:

"Payment for Transportation. Nothing but money can be lawfully received or accepted in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different
162 compensation than the established rates in effect at the time precludes the acceptance of services, property, or other payment in lieu of the amount of money specified in the published schedules."

And the defendant says that thereafter, on October 12, 1906, the said Interstate Commerce Commission promulgated a further administrative ruling, as follows:

"Issuance and Use of Free Passes. The provisions of the act relative to the issuance of free tickets, free passes, free transportation, or free carriage to employees of carriers apply only to persons who are actually in the service of the carriers and who devote substantially all of their time to the work or business of such carriers. Land and immigration agents, unless they are bona fide and actual employees, representatives of correspondence schools, agents of accident or life insurance companies, agents of oil or lubricating companies, etc., are not within the classes to which free or reduced-rate transportation can be lawfully furnished.

"But the Commission does not construe the law as preventing a carrier from giving necessary free transportation to a person travelling over its line solely for the purpose of attending to the business of, or performing a duty imposed upon, the carrier, nor from giving free carriage over its line to the household and personal effects of an employee who is required to remove from one place to another at the instance of, or in the interest of, the carrier by which he is employed.

"Nor does the Commission construe the law as preventing a carrier from giving free or reduced-rate carriage over its line to contractors for material, supplies, and men for use in construction, improvement or renewal work on the line of that carrier, provided such arrangements for free or reduced-rate carriage are made a part of the specifications upon which the contract is based and of the contract itself."

And the defendant says that thereafter a petition was filed with the Interstate Commerce Commission by the complainant herein and by the Postal Telegraph Company jointly, asking for a modification

of the rulings hereinbefore set forth, so far as they might control or govern certain contracts theretofore entered into between the petitioning telegraph companies and certain railroad companies under which the said railroad companies agreed to furnish "free" or "re-
163 duced-rate" transportation to such telegraph companies for the men, materials and supplies necessary in connection with the construction, operation and maintenance of such telegraph lines off the lines of the respective contracting carriers and upon the rights of way of other carriers. And the defendant says the Interstate Commerce Commission, after consideration of said petition, issued, on December 27, 1906, a decision denying the said petition.

And the defendant says that thereafter, on June 3, 1907, the said Interstate Commerce Commission promulgated the following ruling:

Transportation of Men or Property for Telegraph Companies (issued June 3, 1907). In its decision on the petition of the Western Union and Postal Telegraph Companies, issued December 27, 1906, the Commission held it would be unlawful for a carrier subject to the act to contract or stipulate with a telegraph company for the carriage of its officials, employees, or property for any greater or less or different compensation than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of telegraph line and service on its own line. It was held that a group of separately incorporated roads, recognized as a "railway system," may be considered as one in the making of contracts for telegraph service on that system.

"This definitely differentiates between the employees of the telegraph company who are actually engaged in constructing and maintaining a telegraph line along the line of a railway, or in operating such telegraph line as a part of the actual operation of that railway, and those who are engaged in the commercial business of the telegraph company. The fact that railway officials may, by use of D. H. franks, send messages on railway business from or receive such messages at a commercial office of a telegraph company does not constitute that office a part of the operation of any of the lines of railway which such officials represent, nor bring that telegraph office into such relationship with the business of the railways as to warrant treating it as a part of the operating facilities of such railways. Practically all telegraphing so done is "off the line" business and is to be considered as commercial business. The same distinction is to be observed in the hauling of materials and supplies for telegraph companies with which the railway company has contract for telegraphic service."

164 And the defendant says that thereafter, on June 30, 1908, the Interstate Commerce Commission promulgated the following rule:

"Notice as to the Issuance of Passes. It appearing that the ruling issued by the Commission on the 9th day of June, A. D. 1908, relative to the issuance and use of passes, should be modified in certain respects relating to the forms of passes to persons eligible to receive free transportation under the act to regulate commerce, it is ordered that said ruling shall be amended to read as follows:

"Many abuses in the issuance and uses of passes have been discovered by the Commission which it is desired to correct, and to this end, and because of the misinterpretation of the law by carriers generally, the Commission at this time makes announcement that it will recommend the indictment and prosecution of all carriers and persons issuing passes to, or allowing the use of passes by, any persons not included within the designated classes to whom free transportation may be given by carriers subject to the act to regulate commerce as set forth in said act. Among those not included under the provisions referred to are the following:

"1. Officers or employees of news companies other than newsboys.

"2. Officers or employees of telegraph or telephone companies, excepting when personally engaged in operation, extension, repair or inspection of lines upon or along the railroad right of way and used in connection with the operation of the railroad * * *"

And the defendant says that its refusal to further perform certain obligations created by said contract as set forth in paragraph 10 of the Bill of Complaint herein and its statement that such portions of the said contract were annulled by the Hepburn Act as alleged in said paragraph 10 of the Bill of Complaint, were and are in strict conformity with the rulings of the Interstate Commerce Commission hereinbefore set forth and with said Hepburn Act as interpreted by the said Interstate Commerce Commission. The defendant further says that its said refusal was due to and because of the rulings of the said Interstate Commerce Commission and advice of counsel that said rulings were lawful and in conformity with the said Hepburn Act and that it was the defendant's legal duty strictly to comply with the same.

165 6. Referring to paragraph 11 of the Bill of Complaint herein the defendant submits that said paragraph states conclusions of law embodying the principal and perhaps the only issue in this case, and that the defendant need not, therefore, either admit or deny the allegations of said paragraph; but further referring to said paragraph defendant admits that the complainant and the defendant intended by the contract, Exhibit "A" of the Bill of Complaint, to create a joint relation in the construction, maintenance and operation of telegraph lines and property, and that said telegraph lines are an indispensable instrumentality for the performance by each of the parties to said contract of the obligators assumed by it in the transaction of its business.

7. The defendant admits the truth of the allegations of fact of paragraphs 12 and 13 of the Bill of Complaint herein.

8. Answering the allegations of paragraph 14 of the Bill of Complaint herein the defendant admits that the complainant stands ready and is able and willing to perform each and every provision of the contract Exhibit "A" and all conditions and obligations imposed upon the complainant by said contract.

9. Referring to paragraph 15 of the Bill of Complaint herein the defendant submits that said paragraph states conclusions of law and that the defendant need not therefore either admit or deny the allegations of said paragraph.

10. Referring to paragraph 16 of the Bill of Complaint herein the defendant admits the allegations of fact therein contained. The defendant submits that it is not called upon either to admit or deny the allegations of law contained in said paragraph.

Wherefore the defendant having fully answered, confessed, traversed, avoided or denied all the matters in the said Bill
166 of Complaint material to be answered according to its best knowledge and belief, humbly prays this Honorable Court to enter its decree that the defendant be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By HUGH L. BOND, JR., *Second Vice-President.*

WILLIAM AINSWORTH PARKER,
H. L. BOND, JR.,
Solicitors.

167 UNITED STATES OF AMERICA,
District of Maryland, ss:

Hugh L. Bond, Jr., being duly sworn, says that he is Second Vice-President of the Baltimore and Ohio Railroad Company, defendant in the above entitled action; that he has read the foregoing answer to the Bill of Complaint herein and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

HUGH L. BOND, JR.

Subscribed and sworn to before me, the seventh day of October, 1908.

[NOTARIAL SEAL.] GEO. W. HAULENBEEK,
Notary Public.

My commission expires May 1, 1910.

168 In the Circuit Court of the United States for the District of Maryland.

THE WESTERN UNION TELEGRAPH COMPANY

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

Decree.

This cause having come on to be heard at this Term of Court, and having been submitted for final decree upon Bill and Answer, and the Court having heard argument of Counsel for both parties, and it appearing that since the hearing there has been enacted by

Congress "An Act to create a Commerce Court, and to amend the Act entitled 'An Act to Regulate Commerce,' approved February 4, 1887, as heretofore amended, and for other purposes," and the said Act having been approved by the President on the 18th day of June, 1910, and the complainant having in consequence of certain provisions in said Act which make it in its judgment unnecessary to proceed with the said case, prayed leave to withdraw its suit, it is ordered and decreed this 22 day of June, 1910, that the complainant have leave to withdraw its said suit without prejudice, the complainant to pay all costs.

JOHN C. ROSE, *Judge.*

UNITED STATES OF AMERICA,
District of Maryland, To-wit:

I, Arthur L. Spamer, Clerk of the District Court of the United States for the District of Maryland, do hereby certify that the aforegoing is a true copy of the Decree of Court, which was entered and filed on the 22nd day of June, 1910, in the therein en-
169 titled case of The Western Union Telegraph Company vs. The Baltimore and Ohio Railroad Company, No. 56 Equity Docket "F," in said District Court, transferred from the Circuit Court of the United States for the District of Maryland, by Act of Congress, approved March 4th, 1911.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, this 8th day of June, 1916.

[Seal United States District Court, Maryland.]

ARTHUR L. SPAMER, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 6/8/16. A. L. S.]

170 [Endorsed:] P. Ex. 6, June 21, '16.

171 PLAINTIFF'S EXHIBIT No. 7.

G. A. H.

Post Office Department.

WASHINGTON, D. C., July 10th, 1893.

I, Frank H. Jones, Acting Postmaster General of the United States of America, certify that the annexed is a true copy of the original acceptance on file in this Department.

In testimony whereof I have hereto set my hand, and caused the seal of the Post Office Department to be affixed, at the city of Washington, the day and year above written.

[Seal Post Office Department, United States of America.]

FRANK H. JONES,
Acting Postmaster General.

172 This is to certify that the Postal Telegraph-Cable Company a corporation duly organized under the laws of the State of New York for the purpose of constructing, maintaining, and operating lines of telegraph throughout the United States, has by resolution duly adopted and entered upon its minutes, accepted and hereby does accept, pursuant to the requirements of Section 5268 of the Revised Statutes of the United States, all the restrictions and obligations required by law, and that said Postal Telegraph-Cable Company has in like manner duly authorized the filing with the Postmaster General of the United States of this, its acceptance of such restrictions and obligations.

In witness whereof, the said Postal Telegraph-Cable Company has caused this instrument to be sealed with its corporate seal and signed by its President and attested by its Secretary at the City of New York, this seventeenth day of March eighteen hundred and eighty six.

POSTAL TELEGRAPH-CABLE COMPANY,
By JAMES H. WITHINGTON, *President.*

Attest:

[Seal Postal Telegraph-Cable Company, Incorporated 1886.]

J. O. STEVENS, *Secretary.*

173 [Endorsed:] 78. Acceptance of Postal Telegraph-Cable Company. Certificate accepting provisions of Sec. 5268 of the Revised Statutes of the United States. Dated March 17, 1886. Received Ap'l 6, 1886. Address of Company, James H. Withington, President, New York, N. Y.

174 [Endorsed:] Exhibit No. 2. Apr. 17, 1895. Edwin L. Allen, Stenographer. Certified Copy of Acceptance of Post Road Act of Congress by Postal Telegraph-Cable Co. (N. Y.) P. Ex. 7. June 21, '16.

175 G. A. H.

Post Office Department.

WASHINGTON, D. C., July 10th, 1893.

I, Frank H. Jones, Acting Postmaster General of the United States of America, certify that the annexed is a true copy of the original acceptance on file in this Department.

In testimony whereof I have hereto set my hand, and caused the seal of the Post Office Department to be affixed, at the city of Washington, the day and year first above written.

(Blue ribbon.)

(Sgd.) FRANK H. JONES,
[SEAL.] *Acting Postmaster-General.*

176 This is to certify that the Postal Telegraph-Cable Company a corporation duly organized under the laws of the

State of New York for the purpose of constructing, maintaining, and operating lines of telegraph throughout the United States, has by resolution duly adopted and entered upon its minutes, accepted and hereby does accept, pursuant to the requirements of Section 5268 of the Revised Statutes of the United States, all the restrictions and obligations required by law, and that said Postal Telegraph-Cable Company has in like manner duly authorized the filing with the Postmaster General of the United States of this, its acceptance of such restrictions and obligations.

In witness whereof, the said Postal Telegraph-Cable Company has caused this instrument to be sealed with its corporate seal and signed by its President and attested by its Secretary at the City of New York, this seventeenth day of March eighteen hundred and eighty six.

POSTAL TELEGRAPH-CABLE COMPANY,
By JAMES H. WITHINGTON, *President.*

Attest:

[Seal Postal Telegraph-Cable Company, Incorporated 1886.]

J. O. STEVENS, *Secretary.*

[Endorsed:] 78. Acceptance of Postal Telegraph-Cable Company. Certificate accepting provisions of Sec. 5268 of the Revised Statutes of the United States. Dated March 17, 1886. Received Apl. 6, 1886. Address of Company, James H. Withington, President, New York, N. Y.

177 [Endorsed:] Certified Copy of Acceptance of Post Road Act of Congress by Postal Telegraph-Cable Co. N. Y.) P. Ex. 7. June 21, '16.

PLAINTIFF'S EXHIBIT No. 8.

178 "9. Whereas the Railway Companies in the United Kingdom are for the most part either themselves Owners of Telegraphs which are used for the Conveyance of public Messages, and which are also essential for the safe Conduct of the Traffic on their respective Undertakings, or they have contracts for various Terms of Years with Telegraph Companies, whose Telegraphic Apparatus is placed in the Stations and along the Railways and Canals of the Railway Companies, by which Contracts Provision is made with respect to the Matters aforesaid: * * *

"(1) The Postmaster General shall give to each Railway Company Three Months' Notice before he acquires the Undertakings of any of the Telegraph Companies with which the Railway Company has Agreements; and on the Expiration of such Notice such Agreements shall cease and determine:

"(2) On such Acquisition as aforesaid all the Posts, Wires, Instruments, and other Telegraphic Apparatus belonging to the Railway Company, and also all Posts, Wires, Instruments, and other Telegraphic Apparatus belonging to the Telegraph Companies on the

Railway Company's Lines and Canals which are necessary for establishing a complete System of Telegraphy in connexion with the working of Trains and the Traffic of the Lines and Canals, shall become the absolute Property of the Railway Company, and shall be handed over to them by the Postmaster General free of Charge in efficient working Order, so that the Railway Company may be in a position at once to take up and carry on their own Telegraph Work on their own System, and thereafter the said Posts, Wires, Instruments, and other Telegraphic Apparatus shall be maintained and worked by the Railway Company:

"(3) On such Acquisition as aforesaid the Postmaster General shall be entitled to use from Telegraph Stations not on the Lines of Railway all the Wires belonging to the respective Telegraph Companies on the Line, and employed exclusively in the Transmission of the public Telegraph Business, which are erected on the Poles to be handed over to the Railway Company under Paragraph — (2); and he, at his Cost, shall also be entitled to call upon the Railway Company to erect and maintain additional Wires on the said Poles, provided they are sufficiently strong and high for the Purpose; and also to erect new Poles at Places to be agreed upon with Wires over any of the Lines and Canals of the Company, but so that such new Poles shall not interfere in any way with the Convenience or working of the Railway or Canals of the Company, or obstruct the working of the Traffic thereon. The Railway Company shall maintain all the Posts and Wires used for public Messages, the Postmaster General paying for the same as may be agreed or settled by Arbitration:

179 "(4) The Postmaster General may require the Railway Company to affix Wires to existing Posts (if they can bear them), and the Company may have a like Power to affix Wires to the Posts belonging from Time to Time to the Postmaster General, if sufficient for the Purpose, and the Cost of Maintenance of such Posts shall be divided between the Postmaster General and the Company, in proportion to the Number of Wires belonging to each on each Post:

"(5) The Railway Company may shift the Poles, Wires, and Apparatus belonging to the Postmaster General when necessary for the Purposes of their Works or Traffic; but in all such Cases the Postmaster General shall pay to the Railway Company the actual Costs incurred in shifting such Poles and Apparatus, but if such Poles support the Wires of the Railway Company and of the Postmaster General, the Cost of shifting the same shall be apportioned according to the Number of Wires belonging to or respectively used by the Railway Company and the Postmaster General.

"(6) The Postmaster General shall pay the Railway Company the following Sums by way of Compensation:

"*a*. Twenty Years' Purchase of the Amount of the net annual Receipts (if any) of public Telegraph Messages received and forwarded by the Railway Company on their own Account, reckoned on the Basis of the Receipts derived therefrom over a continuous Period of Twelve Months prior to the Thirtieth Day of June One thousand eight hundred and sixty-eight:

"*b.* Twenty Times the Amount of the estimated annual Increase, calculated upon the average Increase of the preceding Three Years of the said Receipts from Telegraphic Messages, or where the Business has been commenced within Three Years calculated upon the Increase during such shorter Period, such annual Amount in case of difference to be settled by Arbitration:

"*c.* All Rents and annual or other Payments payable to the Railway Company by public Telegraph Companies during the still unexpired Periods embraced in their respective Agreements, and at the Terms mentioned in said Agreements respectively:

"*d.* Such Sums as shall be agreed upon, or in default of Agreement as shall be settled by Arbitration, in respect of the Loss by the Railway Company of the Privilege of granting other Way-leaves and making future Arrangements with Telegraph or other Companies, and in respect of granting a Monopoly to the Postmaster General for the Conveyance of Telegraphs over their Railways as herein provided for:

180 "*e.* Such Sums as shall be agreed upon, or in default of Agreement as shall be settled by Arbitration, as the Value of the Railway Company's Reversionary Interest (if any) in the Telegraph Receipts from public Messages on the Expiration of the Agreements with the respective Telegraph Companies:

"*f.* Such Sums as shall be agreed upon, or in default of Agreement as shall be settled by Arbitration, for the Loss occasioned by Removal of any Clerks now provided by the Telegraph Company, and for any extra Cost which the Railway Company may incur in working their Telegraph for Railway Purposes as a separate System:

"*g.* The Postmaster General shall transmit to their respective Destinations all Messages of the Railway Company in any way relating to the Business of the Company to and from any 'Foreign Stations' in the United Kingdom free of Charge:

"*h.* On such Acquisition as aforesaid the Postmaster General shall, as herein provided, have a perpetual Right of Way for his Poles and Wires over the whole of the Railway Company's System, and in consideration thereof he shall pay to the Railway Company such Sum per Mile per Wire over the whole of the said System, by way of yearly Rent, as shall be determined by Agreement between the Parties, or failing Agreement, as shall be fixed by Arbitration:

The Arbitrator, in determining the Amounts to be paid to the Railway Company under this Act, shall have regard to the Agreements which subsist between the Railway Company and any Telegraph Company, and also to a compulsory Sale being required from the Railway Company; and in estimating the Amount to be paid under any one Part of this Section shall have regard to the Advantages to be obtained and the Disadvantages to be sustained by the Railway Company under any other Part of this Section:

"(7) The Railway Company shall, if required by the Postmaster General so to do, from Time to Time, at such Times and under such Regulations as shall be agreed upon, receive Messages for Transmission by the public or private Telegraph Wires (but if the latter, the Railway Messages to have priority), and shall at the Postmaster Gen-

eral's sole Risk and Expense transmit the same either to their Place of Destination, if upon the Company's Lines, or to some convenient Post Office as shall be arranged, and in respect of such Receipt and Transmission the Company shall act as Agents of the Post-
181–188 master General, and shall receive in respect thereof such Remuneration as shall be agreed upon, or in case of Difference as shall be from Time to Time settled by Arbitration. The Postmaster General to provide the necessary Instruments at the Railway Company's Stations for the public Wires, such Instruments to be maintained by the Railway Company at the Expense of the Postmaster General:

"(8) The Railway Company may, notwithstanding anything in this Act contained, and without Payment to the Postmaster General, from Time to Time make Arrangements with Coalmasters, Ironmasters, and Traders generally upon the Company's System for the Erection and working of private Telegraphs between Coalpits, Ironworks, Factories, Warehouses, and Offices in connexion with the Stations of the Company, or over their Line; but such Telegraphs shall be used for the Transaction of private Business only, and no Money Payment shall be made or received in respect thereof except by way of annual Rent or Payment for Wayleave and other Accommodation:

"(9) Except as aforesaid, the Railway Company shall not transmit or permit the Transmission of any Telegraphic Message through their Wires:

"(10) All Matters of Difference between the Postmaster General and Railway Companies arising under this Act shall be settled by Arbitration, in conformity with the Enactments of 'The Railway Companies Arbitration Act, 1859,' with respect to the Settlement of Disputes by Arbitration; and the Provisions of that Act with respect to Arbitration shall for these Purposes be incorporated with this Act:

"(11) Notwithstanding anything specified in this Act or in any Agreement by this Act confirmed, the Umpire to be appointed in any Arbitration between the Postmaster General and any Railway Company shall, in default of Appointment by the Arbitrators, be nominated by the Chief Justice of Her Majesty's Court of Common Pleas at Westminister for the Time being."

[Endorsed:] P. Ex. 8. June 21, '16.

189 P. Ex. 9.

June 21, '16.

From the time of the first Telegraph Act, 1863, telegraph undertakers have always had the power of using both the roads and the railways of the country. The Telegraph Act, 1863, gave the old telegraph companies the right to put their telegraphs upon the railways of the country, but it was qualified by the obligation to obtain the consent of the directors of the companies. The result of that state of things was that the telegraph companies made

rather complicated arrangements with the various railway companies, the general character of those arrangements being that the telegraph companies put up lines of telegraph along the railways, and maintained them for the railway companies, and the railway companies in return gave them the right of using their lines for the public telegraphs. The telegraph companies put up their lines, and some of those were used by the railway companies, and they obtained the use of those lines free of expense; and, on the other hand, the telegraph companies had a similar right of carrying their telegraph lines which they used for public messages along the railway. They got their wayleave, and the railway companies got their telegraph lines free. That was the general nature of the arrangement. At the time that the transfer of the telegraph took place in 1870, the railway companies of the country were so extensively used that out of 88,000 lines of public telegraphs throughout the country 40,000 were constructed on railways. Then, when the telegraphs were taken over by the State, a new arrangement was come to by the various railway companies, and the general nature of that arrangement was this. The railway companies surrendered the right which some of them previously exercised—some did and some did not—to transact public telegraph business. The Postmaster-General handed over to the railway companies all the telegraphs which had previously been used for railway purposes, although
190-246 they had been put up, and constructed by the telegraph companies, and made those over to the railway companies, and those became the absolute property of the railway companies. Then the Postmaster-General retained the telegraphs which had been put up along the railways, and which had been used for public purposes—those became his property—they were the property of the old telegraph companies, to whom, of course, the Postmaster-General paid compensation, and they became the property of the State. Then the Postmaster-General obtained a general wayleave over the whole system of the country. Then, another feature of the arrangement was that, whereas previously the telegraph companies had maintained all the lines of telegraph on the railways, after the transfer of the telegraph it was arranged that the railway companies should undertake the work of maintenance, and from that time they maintained, not only their own telegraphs on the railways, but the Postmaster-General's telegraphs, and the Postmaster-General paid them a certain agreed sum for the maintenance of his lines. Then the Postmaster-General undertook to transmit railway messages free of charge, which is another very valuable concession made to the railway companies, one which is now represented by very large sums of money; and, in addition to all that, the Postmaster-General paid a very considerable sum of money to the companies, in some cases in the form of lump sums paid down, and in other cases in the form of annual payments. I think the Telegraph Acts have been handed round to the Committee. I have put together the different Acts which bear upon the subject, and the arrangements with the railway companies, which I have been summarising, will be found in Section 9 of the Telegraph Act, 1868.

A number of the companies are actually mentioned in Section 9, and Section 9 indicates the arrangement made with them; then with other companies agreements were made very much on the same lines, and those agreements are confirmed by Section 13 of the Act of 1868. The total amount, Sir, which was paid to the railway companies under those arrangements in capital sums paid down was over one and a half millions. In addition to that, annual sums amounting to more than £25,000 a year are paid to railway companies for the right of using their lines—a wayleave over their lines—and in addition to that, more than £75,000 a year are paid by the Postmaster-General to the companies in respect of maintenance of the lines of telegraphs which are constructed along the railways.

247-249 PL. EX. 10.

287. I am not sure whether there is any point in this; but does not the Post Office send, and did not the telegraph companies from the beginning send, messages for the railway companies free of cost?—Yes, and we do so now.

288. Has not that very much increased during these years?—Yes, certainly since the agreement was made.

250 PLAINTIFF'S EXHIBIT NO. 11.

Extract from pp. 410, 411, *of* 31 *Interstate Commerce Rep., July 15th*, 1915.

"IV.

"The practice of granting free transportation to passengers and private cars, although less general than formerly, in part because of prohibitory legislation upon that subject, is still a heavy burden upon the railway passenger service, and it is recommended that the practice be still further restricted by the carriers. It appears from the Commission's compilation of the answers to the questions addressed by it to the carriers, that there were issued during the eleven months ending November 30th, 1913, by seventy-eight of the roads in official classification territory 629,668 annual passes and 408,848 passes for shorter terms, including passes granted to railroad officials and employees; and in the single month of June 1913, there were issued passes for single trips to the number of 482,709. These trip passes represented 88,575,298 passenger-miles.

"June is perhaps not a representative month, but at that rate the number of trip passes issued in the year would be approximately 5,792,500, representing over one billion passenger-miles.

The amount of travel on annual and term passes has not been determined. At the average rate of fare per passenger-mile in official classification territory in 1913, the passenger-miles represented by trip passes alone would have yielded in passenger revenue $18,-

520,000. Some of these passes were no doubt issued to em-
251 ployees traveling on business for the carriers, and, of course, it is not assumed that the same amount of travel would have been performed by other passengers if fares had been collected; but even a fraction of this travel would have yielded the carriers a most substantial sum in revenue if paid for at tariff rates. If to trip passes is added the travel on annual and term passes it will perhaps be found that the travel on passes exceeds 10 per cent of the total passenger travel in official classification territory.

"Compilations prepared by the Commission show that the revenue from private cars handled free during the year 1913 on eighty-eight of the roads which have made answer to our question would, at tariff rates, have amounted to $644,250.79.

"But the direct cost and revenue loss attendant upon the present practice are less serious than is its demoralizing effect. It is natural that subordinates should be wasteful when their superiors are extravagant; and that efforts to secure economies should often prove futile when, at the expense of stockholders or the public, the luxury of a private car is freely granted for personal and private use to officers and directors or even to subordinate officials and members of their families. The record of one of the railroads most prominent in the appeal for a freight rate advance discloses such liberal grant of free transportation of private cars, not only to directors and officers of other independent railroads, but to lesser officials of such carriers and to members of their families. Among
the beneficiaries were the wives of first, second and third vice-
252 presidents, the wife of a superintendent, the wife of a superintendent of telegraph, the mother of a chairman, the secretary of the vice-president of a telegraph company, and the chief clerk to a president. Indeed, not a private car merely, but two special trains were furnished free to the widow of a former director, the tariff rate for which service would have been $3,466. The wife and daughter of the president of that company enjoyed in a single year free transportation in private cars for nine trips on which the tariff rates would have aggregated $3,577."

[Endorsed:] P. Ex. 11. June 21, '16.

253 PLAINTIFF'S EXHIBIT No. 12.

British Post Office Telegraphs.

The following figures showing the operating results of the British Post Office Telegraphs, are taken from the reports of the Postmaster General of Great Britain.

Year ending March 31st.	Receipts.	Actual operating expenses.	Operating loss.	Total annual loss including interest paid and fresh money expended.
1908....	£3,103,361.	£3,508,568.	£405,207.	£969,485.
1909....	3,098,452.	3,672,254.	573,802.	1,046,757.
1910....	3,165,549.	3,599,078.	433,529.	1,049,213.
1911....	3,166,007.	3,695,615.	529,608.	1,186,673.
1912....	3,194,484.	3,757,368.	607,884.	1,068,148.
1913....	3,176,327.	3,524,050.	347,723.	1,175,347.
1914....	3,118,216.	3,509,010.	390,794.	1,211,742.
1915....	3,418,954.	3,714,198.	295,244.	1,232,955.

P. Ex. 12. June 21, '16.

254 Supreme Court, Appellate Division, First Department.

POSTAL TELEGRAPH-CABLE COMPANY, Plaintiff-Appellant,

against

TONOPAH AND TIDEWATER RAILROAD COMPANY, Defendant, Respondent.

It is hereby stipulated that the twelve original exhibits accompanying this stipulation are the exhibits referred to on pages 38 and 39 of the printed case on appeal in this Court, and that defendant's Exhibit "A" is the same as the copy of contract attached to defendant's answer in this case.

Dated February 7th, 1917.

WILLIAM W. COOK,
Attorney for Plaintiff-Appellant.
STEELE, DE FRIESE & STEELE,
Attorneys for Defendant-Respondent.

Endorsed on cover: File No. 25,761. New York Supreme Court, Appellate Division, First Department. Term No. 931. Postal Telegraph-Cable Company, plaintiff in error, vs. Tonopah and Tidewater Railroad Company. Filed February 8th, 1917. File No. 25,761.